93-794

No. _____

Supreme Court, U.S.
FILED
NOV 18 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

David Gillum,

Petitioner,

v.

The City of Kerrville, Texas, Glenn D. Brown, in his official capacity as City Manager and his individual capacity, Louis A. Barrow, Jr., in his official capacity as Police Chief, and in his individual capacity, Kirk McCarley, in his official capacity as Personnel Director and in his individual capacity,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Pickering/Connick balancing test for determining the protected status of speech of public employees should be reformulated to provide clearer guidelines to the lower courts for deciding claims of retaliatory discharge for the exercise of the right of free speech?

2. Whether the analysis of the Court of Appeals, used to determine if the speech identified by the Petitioner as implicating a matter of public concern for purposes of First Amendment protection, conflicts with the analytical framework established by this Court's decisions in Connick v. Meyers, 461 U.S. 138, and Rankin v. McPherson, 483 U.S. 378?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, David Gillum, hereby petitions for a writ of certiorari to review the judgment and opinion of the

United States Court of Appeals for the Fifth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is dated September 16, 1993, is reported at 3 F.3 117 and is reprinted in the Appendix, pp. 1-24. The case number is 93-8006 and the date of decision was September 16, 1993. The prior Order and Judgment of the United States District Court for the Western District of Texas, San Antonio Division, were entered on November 30, 1992. The case number is SA-91-CA-0090. The Order and Judgment of the District Court are reprinted in the Appendix, pp. 26-74.

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[1]All parties to this proceeding appear in the caption of the case.

JURISDICTION

The judgment of the Court of Appeals (App., p. 25) was entered on September 16, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment of the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The Petitioner is David Gillum ("Gillum"), formerly employed by the City of Kerrville, Texas ("Kerrville") and a "good cop" in the words of the present Chief of Police of the Kerrville Police Department ("KPD"). R. at 228. On

August 1, 1990, Gillum reported allegations to his supervisor and the Internal Affairs Division ("IAD") of the KPD regarding criminal misconduct, i.e., "smoking dope," against Louis A. Barrow Jr. ("Barrow"), the Chief of Police at that time. The events which were then set in motion by Gillum's report of such allegations, and his subsequent statements, i.e. "speech" that the investigation of the allegations conducted by the IAD was irregular and biased, culminated in his constructive discharge from employment. Gillum had never been disciplined before. Gillum contends he was discharged in retaliation for the exercise of his right of free speech.

Gillum Reported Allegations of Misconduct

Initially, Gillum approached Sgt. Joe Lanning ("Lanning"), the Chief of the

IAD, on August 1, 1990, for guidance on how to handle information he had received from a reliable confidential informant that a woman with a criminal record (the "Wom-an") had been overheard bragging about "smoking dope" with Barrow. R. at 690, 986. Gillum, a patrolman in the KPD for three years, had no prior experience in such matters. Barrow, employed by the KPD since January of 1990, had previously been the subject of rumors at the KPD concerning his possible prior involvement with drugs during his employment with the City of Beaumont, Texas. Agreed Pretrial Order, Undisputed Facts 5 (dd). Gillum had earlier in the day reported the allegations to his immediate supervisor, Lt. Rosie McCray ("McCray"), pursuant to his understanding of the provisions of a 21-page document entitled Procedural Order

No. 90-06 (the "Order") which created the IAD and provided for the investigation of complaints of misconduct. R. at 681. Although Barrow devised and implemented the Order after his employment with the KPD, it does not specifically provide a procedure for investigating the Chief of Police. R. at 1233, 1257. Further, even if the Order can be construed to provide a means for investigating a complaint against the Chief of Police, the Chief of Police, i.e., Barrow, would in accordance with the Order, be responsible for the disposition of his own investigation. Id.

Prior Reports of Misconduct Uninvestigated

Gillum was apprehensive about reporting the allegations to Lanning because he knew that Lanning was

appointed to his position by Barrow who was a personal friend. R. at 680. Gillum also knew that officers Ken Crosthwait and Michael Kuntz of the KPD had previously reported misconduct against Barrow which were never investigated by Lanning. R. at 955. Lanning, in his deposition testimony, denied having received such reports concerning Barrow, in direct contrast to his testimony in Gillum's first appeals hearing before Kirk McCarley ("McCarley"), the Personnel Director of Kerrville, and Barrow, on September 12, 1990, (the "McCarley Hearing"). R. at 986-989, 742. Barrow had, in fact, been reprimanded prior to August 2, 1990, by Glenn D. Brown ("Brown"), the Kerrville City Manager, and McCarley, for "...spending too much time at the Dry Dock Oyster Bar...con-

cerning...perceptions that he was creating in the eyes of the public by perhaps being out in public and drinking too much, too frequently; this sort of thing." R. at 287. Barrow was subsequently, on October 31, 1990, again reprimanded by Brown who stated:

> As you know, I told David Gillum and the news media last week that I supported and stood behind you. However, unless some things change, it will be difficult for me to continue making public statements of support. R. at 340-341.

Brown later told Barrow, "That he [Barrow] needed to find a job someplace else" because "...his personal lifestyle..." was not "...compatible with what I expected of a police officer." R. at 246. Barrow left employment with the KPD in March of 1992. Id.

Gillum's Investigation Was Authorized

Despite his apprehension, Gillum reported the allegations to Lanning who authorized Gillum to interview the Woman without requiring a written complaint pursuant to the provisions of the Order concerning internal investigations. Lanning assured Gillum the investigation would be kept confidential. R. at 681. However, he subsequently contacted McCarley and Administrative Lt. Chuck Dickerson ("Dickerson"), his superior, who also agreed to allow Gillum to proceed with an investigation without requiring a written complaint. R. at 284, 285, 993, 994. McCarley has acknowledged he knew Lanning was not following the Order but, "...concurred with that action." Id. Furthermore, while Lanning's deposition testimony is at variance with his sworn affidavit filed with the Motion

for Summary Judgment (the "Kerrville Motion") filed by Brown and McCarley, and while it is unclear whether he immediately contacted Barrow to report the allegations, it is clear Lanning, contrary to his pledge of confidentiality, informed Barrow of the allegations on August 2, 1990, and thereafter Lanning changed his "position" on Gillum's participation in the investigation. R. at 292-94, 1046-48.

Lanning Acknowledges Gillum Will Have a "Bitter Taste....Thinking Half an Investigation was Done"

After Gillum interviewed the Woman and reported the information he obtained to Lanning on August 2, 1990, Lanning authorized a second interview of an individual named by the Woman as a possible witness. R. at 681, 995, 1046-48. How-

ever, Lanning shortly summoned Gillum back to the police station and stated he needed to change his "position around on this deal." R. at 686. Gillum, fearing retaliation for having reported allegations of misconduct against his Chief, and to protect himself, tape recorded this meeting with Lanning and a subsequent meeting on August 2, 1990, with Barrow, Lanning, McCray and McCarley. R. at 682. Certain meetings with McCray, Barrow and McCarley on August 6, 1990, were also tape recorded by Gillum. The transcripts of such tape recordings are included in the record of this case and have been stipulated by the parties to be true and correct. R. at 686, 715. These transcripts have been reprinted in the Appendix, pp. 75-157. According to the transcript of the taped conversation with

Lanning after Gillum was called back to the police station, Lanning stated that any further investigation must be conducted through the IAD because the "...allegation is serious about the executive of this department." R. at 687. After some discussion, Lanning indicated he knew Gillum was suspicious the investigation would be covered up. Id. Lanning stated, "...I know that there is going to be a bitter taste in your mouth about this, thinking that there has been half an investigation done..." R. at 693. Gillum expressed his concern that the allegations would not be investigated, that Lanning was biased, and that, "....somebody is going to benefit." R. at 694. Lanning angrily replied, "I don't give a shit right now whether you trust me or not..." Gillum

said, "[F]rankly, I don't, I don't, not on this, I don't..." Lanning replied:

> "[I] don't know how to make you trust me. All I know now is that I'm going to have to do a full investigation, a written documented investigation, because I have to cover my ass when you tell someone else out here that I went in there and that's all a crock of shit... that you went in there and you told me and they cover it up, because I perceive that being the next step, I perceive that as being the next rumor..." R. at 694-95.

Lanning then ordered Gillum not to contact any more witnesses and Gillum indicated he understood and agreed that he was to no longer take part in the investigation. R. at 695 (emphasis added). Lanning finally states he will have to take a statement from Gillum, who replies "no," that "we [sic] will get an attorney." Lanning later tells Gillum he is not entitled to an attorney. App. p.

98. It is significant to note the Order speaks in terms of a written "complaint" and Gillum made clear he was not making a "complaint" only reporting the allegations of wrongdoing of which he neither knew to be true or false. R. 708, 710, 688. It is also significant for First Amendment analysis that Gillum had already questioned the investigation process prior to the request for a written statement. App., pp. 79, 82, 92, 93 and 94.

Gillum Obeyed Orders

Gillum never at any time indicated he would not obey Lanning's order to cease his participation in the investigation and never took any further action with regard to the investigation; the only actions taken by Gillum in the investigation were those authorized by

Lanning and approved by McCarley and Dickerson. R. at 695, 698, 701, 702, 969, 998, 1001. The Respondents have stated in earlier briefs that Gillum, "...believed that he had his own prerogative to decide when, where, and how to investigate those allegations about misconduct" and that Gillum insisted, "...on a right to personally investigate the Chief of Police." Brief of Appellees, City of Kerrville, Glenn D. Brown and Kirk McCauley, pp. 17. No factual support has ever been cited for these allegations because they are untrue. Lanning has admitted he was not aware of any further investigation by Gillum of the allegations of misconduct against Barrow after August 2, 1990. R. at 998. Lanning states only that Gillum refused to give a written statement, which was refused by

Gillum until he sought the advice of counsel.

Gillum Protested Barrow's Presence and Participation in the Investigation

Later on August 2, 1990, Gillum was ordered into a meeting in Barrow's office with McCarley, Lanning, McCray and Barrow, the target of the investigation, who demanded to know what was "going on" even though Lanning had already informed him of the allegations. In fact, Barrow, in the later McCarley Hearing, admitted he knew the Woman, had drunk beer with her at his apartment complex and had twice discussed her recent arrest with her, although he denied "smoking dope." R. at 751. Gillum indicated he did not intend to further investigate the allegations because he had been told by Lanning, "...what I can do and what I

can't...and...I am going to abide by it." R. at 701. Gillum did express his opinions that Barrow's presence and apparent role in the investigation were improper and that the allegations should be properly investigated by an outside agency. R. at 701, 708. Although he twice stated he had given Lanning all the information he had obtained, Barrow and McCarley demanded "cooperation." R. at 712. Barrow also wanted to know "how long" it had taken Gillum to obtain his employment with the KPD, knowing Gillum had long endeavored to gain such employment. R. at 710. Barrow inquired if Gillum understood where his actions left him with regard to his employment with the KPD. R. at 710. Gillum responded he thought Barrow would either fire or

suspend him and he did not want either alternative. R. at 712.

Barrow's Ultimatum:

Cooperate in Investigation to

"Clear My Name" or "Give Me That Badge"

McCarley, in the meeting in Barrow's office then made the statement that, "[W]hat kind of investigation is required on things, that, you know, have no, you know, have no truth." R. at 712. Gillum questioned how McCarley could make such a statement because the allegations had not been fully investigated. R. at 712. McCarley urged Gillum to refrain from "biting the hand that feeds you." R. at 713. Gillum, just before the end of the meeting, twice emphatically stated, "I'm not quitting." R. at 713. McCarley continued to insist there was no truth to the allegations and that Gillum should

"cooperate" or let it "drop right now and we never hear a thing about it again, any rumors, allegations, anything having to do with him or anybody else in this department." R. at 713. Finally, Barrow, visibly angry, demanded in a raised voice that Gillum choose between cooperating in an investigation to "clear my name" or "give me that badge." R. at 714. Gillum, believing he had been ordered to perform illegal acts, i.e., engage in official misconduct and possibly others, and that he could become involved in a conspiracy to "cover-up" Barrow's wrongdoing, placed his badge on the table and stated, "I won't compromise this badge." R. at 680, 714. Upon leaving Barrow's office, Gillum stated to Larry Rhodes, the KPD dispatcher on duty, "Just so you'll know, I didn't quit." R. at

1018. Gillum contends he was constructively discharged when faced with the choice given him by Barrow. The Court of Appeals agrees whether he quit or lost his job on this record is a question of fact. App. p. 10.

Gillum Did Not Quit

Gillum reported to duty on his next shift on August 6, 1990, and discovered his name had been marked off the duty list. R. at 682. McCray indicated she did not know his status with the KPD, even though she was present at the August 2, 1990, meeting. When Gillum went to see Barrow, he was informed he was no longer employed by the KPD. R. at 682. McCarley later stated Gillum's relationship with Barrow was irreparably damaged as a result of Gillum's actions and there was "no way" Gillum would be treated by

Barrow as he had been previously. R. at 718. McCarley also told Gillum he was no longer employed by the KPD. R. at 719. Gillum did not clean out his locker on August 2, 1990, and it is undisputed that Gillum never submitted a formal resignation.

McCarley Admits Gillum Could Have Thought Something was Going to be "Swept Under the Rug"

After the existence of the tape recordings was revealed, McCarley testified it was "inappropriate" for Barrow to be advised of the allegations before an investigation had taken place and that Gillum could have formed a perception that something was going to be "swept under the rug." R. at 281, 291. McCarley also indicated it was "unusual" for Barrow, the target of the investigation,

to be asking the investigating officer what information he had about the investigation. R. at 286-88. McCarley further made the statement in his deposition that Gillum had "specifically stated in that meeting, 'I have information but I feel uncomfortable releasing it.'" R. at 289. To the contrary, Gillum twice plainly stated that Lanning knew everything about the investigation Gillum did. R. at 712. Brown, in his deposition testimony, agreed it was inappropriate for Barrow to demand Gillum reveal information concerning his investigation into the allegations of misconduct and to demand cooperation to "clear my name." R. at 260. Likewise, Dickerson testified that, in his opinion, it was improper police procedure to have a target of an investigation present at the beginning of

the investigation, with witnesses being asked to divulge information in front of the suspect. R. at 227. Despite the foregoing agreement by Brown and McCarley with Gillum's position that Barrow's presence was improper, they have insisted the focus of this case should be on Gillum's "conduct" in the investigation, i.e. refusing to provide a written statement and not on his speech that was critical of the manner in which the investigation was being conducted and Barrow's apparent role in the investigation.

The Brown Hearing

After Gillum's discharge, a second appeals hearing was held before Brown on October 4, 1990. Brown agreed he basically reaffirmed McCarley's and Barrow's earlier decision in the Hearing that Gillum had voluntarily resigned, although

he admitted he knew at the time of the hearing that Gillum was concerned about a "coverup" of wrongdoing by Barrow. R. at 268-71. After the hearing Brown offered Gillum reinstatement, without back pay, which Gillum refused, but admitted if Gillum did not quit, it would not be fair for back pay to be denied. R. at 267. Brown also admitted he understood that McCarley's statement to Gillum that Barrow would, "never treat you [Gillum] the same again," might have affected Gillum's decision whereby he declined reinstatement. R. at 263. Gillum then brought this suit asserting both federal and pendent state law claims.

Prior to his discharge, Gillum had never been disciplined by the KPD. R. at 282-83. Brown has testified he was not aware of any misconduct for which Gillum

should have been fired. R. at 271. McCarley also stated that his and Brown's decision after the McCarley Hearing was based on their belief Gillum had resigned and not on any finding he was insubordinate. R. at 297-98.

The District Court noted in its Order that Gillum was convicted of the felony offense of aggravated assault on a peace officer with a deadly weapon. This incident occurred on January 1, 1992, nearly a year and a half after the events of August 2, 1990, and it is unclear why this incident [after being raised by the Respondents] was considered relevant by the District Court in determining whether they violated Gillum's constitutional rights. It is a disputed fact whether severe depression from Gillum's discharge from employment and his unsuccessful

attempts to acquire other employment were a precipitating factor in causing his actions during this incident. Medical experts were designated in the Agreed Pretrial Order and extensive discovery on this issue has been completed by the parties. Agreed Pretrial Order 5 (ccccc).

Contrary to most cases where the parties must rely on their best recollections of what was said, the parties in this litigation have agreed the transcripts of the meetings that were tape recorded on August 2 and 6, 1990 are accurate and Gillum has identified by underlining that speech he contends is protected by the First Amendment of the United States Constitution.

The Respondents have characterized the foregoing as an internal employment

dispute involving only a personal matter that does not rise to the level of a matter of public concern. On appeal they focus solely on Gillum's refusal to provide a written statement when requested by Lanning, ignoring the totality of the speech in which the refusal occurred and the predominance of Gillum's criticisms of the investigation over the issue of the statement. They do not contend Gillum was terminated for refusing to provide a statement. They say he simply quit. Gillum contends his speech that was critical of irregularities he perceived in this investigation of possible wrongdoing and the bias of the assigned investigator does involve matters that would be of concern to the citizens of Kerrville, who undeniably would be interested in whether serious

allegations of misconduct against their Chief of Police are properly investigated. His conduct in refusing to participate in what he further perceived to be a possible cover-up of such wrongdoing is also expressive of his beliefs and motives as evidenced in his speech on these issues. See Gillum's Affidavit, App. p. 158.

THE RULINGS BELOW

The District Court, having reviewed the evidence offered by the parties, granted summary judgment against Gillum. The District Court was of the opinion Gillum alleged no facts which constituted "speech," but only a general course of conduct, citing Dennison v. County of Frederick, Va., 921 F.2d 50 (4th Cir. 1990), a case subsequently distinguished by the Fourth Circuit in Maciariello v.

Sumner, 973 F.2d 295 (4th Cir. 1992). The District Court also felt Brawner v. City of Richardson, 855 F.2d 187 (5th Cir. 1988), which Gillum cited in support of his position that his speech was protected, was inapplicable, because Gillum did not go to an outside agency. Of course, Gillum should not forfeit his right to speak by choosing an internal forum to criticize the irregularity and partiality of the investigation. See Givan v. Western Line Consol. School District, 439 U.S. 410, 415-416 (1979) (First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly). It is noteworthy that Officer Brawner also refused to answer questions during an internal investigation without consulting

with his lawyer. Brawner v. City of Richardson, at 190. Thus, in an analogous fact situation, the Fifth Circuit reached a contradictory conclusion in Brawner to the finding made here.

The Court of Appeals was not in this case inclined to say Gillum did not speak or engage in expressive conduct within the contemplation of the First Amendment but decided the focus of Gillum's speech was to dispute his role in the internal investigation and that in effect he was speaking only as an employee embroiled in a personal employment dispute. In other words, there was no matter of "public concern" attributable to Gillum's speech. The Court of Appeals further failed to address the conclusory statement made by the District Court that even assuming Gillum's conduct did amount to speech,

"...it was not protected under the balancing test..." App. p. 52. As discussed below, Gillum offered evidence to show his speech had no disruptive effect on the KPD. Finally, the Court of Appeals never addressed the issue of qualified immunity, presumably because it found no constitutional claim was asserted by Gillum. Its disposition of the conspiracy claim of Gillum was apparently decided on the same basis.

REASONS FOR GRANTING THE WRIT

It is well established that a public employee may not be discharged for exercising his or her right to free speech under the First Amendment. Rankin v. McPherson, 483 U.S. 378 (1987). However, the appropriate test is to balance the interests of the [employee], as a citizen, in commenting upon matters

of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. 563, 568 (1968). Accordingly, there are two special and important reasons why this petition for a writ of certiorari should be granted. First, the determinations by the District Court and the Court of Appeals of whether the speech of Gillum implicated a "matter of public concern" exemplifies the unequal treatment that results when the lower courts lack clear guidelines in making the threshold inquiry into protected speech required by this Court in Connick v. Meyers, 461 U.S. 138 (1983). (If employee expression cannot be fairly characterized as constituting speech as a matter of

public concern, it is unnecessary to scrutinize the reasons for his discharge. 461 U.S. at 146.) Offering no clearer guidelines than "when employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community..." Connick, 461 U.S. at 146, this Court has permitted irreconcilable conflicts to develop in the lower courts in cases applying this confusing standard to similar fact situations, including between different panels in the Fifth Circuit. Cf. Thompson v. City of Starkville, Miss., 901 F.2d 456 (5th Cir. 1990); Brawner v. City of Richardson, supra. In essence, the current formulation of the Pickering/Connick balancing test with respect to the "public concern" inquiry, does not

promote certainty to any reasonable degree, for public employers in evaluating the possible adverse consequences of employment decisions related to speech of their employees, and as a result of the wide discretion afforded the lower courts, denies consistent treatment to public employees who claim retaliatory discharge for the exercise of their right of free speech. Both of these factors should compel a re-examination of the policy interests involved in the threshold inquiry and to determine whether the balancing test should be reformulated to provide a more predictable and uniform approach to resolving the competing interests of the employer, with the fundamental right of free speech secured to all citizens, albeit they be a public employee, by the First Amendment to the

United States Constitution. Secondly, if this Court should decide the policy reasons for reformulating the balancing test advanced in this petition are not sufficiently strong to justify a change in the law, then it is clear the District Court and the Court of Appeals have not properly applied the principles of Connick and Rankin to the facts in this case. There can be no doubt that words i.e. speech were spoken here. They are verbatim before this Court. The issue is whether the speech of Gillum involved matters purely of personal concern, matters of public concern, or a mixture of both. Speech involving the latter two categories has been and should be recognized as protected. See Connick v. Meyers, 461 U.S. at 149 (The speech of Meyers was found to contain components of

both protected and non-protected speech). The lower courts in this case should have then applied the remainder of the balancing test for purposes of First Amendment analysis. Because in this instance, they found there was no "speech" or the speech of Gillum did not implicate a matter of public concern, they never reached that point in their analysis. This Court has before held it has a constitutional obligation to examine independently the whole record to ensure the rulings below do "not constitute a forbidden intrusion on the field of free expression" Rankin v. McPherson, 483 U.S. 378, 107 S. Ct. 2891, 2897 n. 9. This will require a review of the form, content and context in which this speech occurred, consistent with Connick and Rankin, to determine whether the Court of

Appeals has decided a question of law in a way that conflicts with these decisions.

I.

REFORMULATION OF THE BALANCING TEST

In order to establish a constitutional violation a public employee must now first prove that his speech involved a matter of public concern. Rankin v. McPherson, 483 U.S. at 386; Connick v. Meyers, 461 U.S.at 147. The court must then determine if the employee's interest in commenting upon matters of public concern is greater than his employer's interest in promoting the efficiency of the public services it performs. Pickering v. Board of Education, 391 U.S. at 568. The state has a burden of coming forth with evidence on this point. Rankin v. McPherson, 483 U.S. at 388. Finally, the

employee must show that his speech motivated the employer's decision to terminate him from employment. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977). While this final element of the cause of action involves a question of fact, the first two issues are now decided by the courts as matters of law. Rankin, 483 U.S. at 386.

What is here involved, is the threshold inquiry made a part of the foregoing analysis. Gillum would argue the lower courts in this case erred in their conclusion the speech he has identified does not involve a matter of public concern, and that the error is due to the lack of any clear guidelines or standards for making that determination. He would suggest that other courts faced with the task of determining whether speech

implicates a matter of public concern in similar fact situations have reached widely divergent and oftentimes irreconcilable results. See, Marshall v. Allen, 984 F.2d 787 (7th Cir. 1993) (Adding to the analysis that "The Connick test requires us to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light?"...at 795); Maciariello v. Sumner, 973 F. 2d at 299 (Police officers engaged in some conduct protected by the First Amendment in discussing with one another their suspicions of wrongdoing by superior); Buzek v. County of Saunders, 972 F.2d 992 (8th Cir. 1992) (Subsequent speech was protected even though police officer had been earlier admonished such speech presented "professional ethics" question); Wulf v. City of Wichita, 883 F.2d 842

(10th Cir. 1989) (A police officer's letter subsequent to a transfer, concerning his complaints about the police chief, while arguably linked to a personal dispute with the Chief, contained allegations of public concern); Conway v. Smith, 853 F.2d 789, 796 (10th Cir. 1988) (per curiam) ("Speech which discloses any evidence of corruption, impropriety, or other malfeasance on the part of city officials, in terms of content, clearly concerns matters of public import"); Solomon v. Royal Oak Township, 842 F.2d 862 (6th Cir. 1988); Hall v. Ford, 856 F.2d 255, 260 (D.C. Cir. 1988) (neither does a topic otherwise of public concern lose its importance merely because it arises in an employee dispute) (emphasis in original); Brocknell v. Norton, 732 F.2d 664, 668

(8th Cir. 1986). Various commentators have likewise argued that a public employee's right to free speech is ill-defined and inadequately protected, because of the inconsistent and confusing application of the public concern requirement. See generally, Allred "From Connick to Confusion: The Struggle to Define Speech in Matters of Public Concern," 64 Ind. L. J. 43 (1988); Cynthia K. Y. Lee, Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement, 76 Cal. L. Rev. 1109 (1988); Paul Ferris Solomon, The Public Employee's Right of Free Speech: A Proposal for a Fresh Start, 55 U. Cinn. L. Rev. 449 (1986); Developments - Public Employment, 97 Harvard L. Rev. 1611, 1757 (1984). Furthermore, this Court has been able to muster only bare

majorities in decisions affecting this issue. The strongly worded dissent in Connick, joined by Justice Stevens, criticized the narrower conception of what subjects are of public concern adopted by the majority and concluded the majority had weighed the context of the speech at issue twice and removed from the threshold inquiry the policy considerations for deferring to the employer when the speech is found disruptive as articulated in Pickering, 391 U.S. 567. Justice Scalia, writing in dissent, in Rankin noted all attempts fail to advance the definition of public concern beyond the circular statement that "speech on matters of public concern is that speech which lies at the heart of the First Amendment's protection." Rankin v. McPherson, 483 U.S. at 395. Accordingly,

while Connick and Rankin may have been attempts to define the types of speech that may be considered "matters of public concern," as the term was used in the Pickering balancing test, Gillum would argue there clearly has been permitted far too great a latitude for misapplication of the critical factor in this analysis. Rather than the disruptive effect of speech on the operation of public offices, that was the primary focus of Pickering, sanctioning of "public concern" as a separate threshold inquiry has skewed the analysis of protected speech beyond the original policy considerations for the balancing test. This Court should, therefore, accept this case as an opportunity to expound on the efforts made in Connick and Rankin, and consistent with the

policy reasons advanced here, reformulate the balancing test in a way that recognizes greater respect for First Amendment values and gives greater emphasis to the public's interest in having access to legitimate criticism of the operation of their governmental institutions in order that they might be better informed of the consequences of their investment in government. "Re-inventing" government, or exposing malfeasance and abuse of office, or improving efficiency in the delivery of government services, are much more attainable goals if a reformulated test can more adequately prevent a chilling effect on the exercise of free speech by public employees. A greater emphasis for the public interest in the analysis of protected speech would likewise recognize critical speech may

actually advance efficient government operations and that overly broad restrictions on such speech may result in a less that optimum return on the public's investment. The Public Employee's Right of Free Speech: A Proposal for a Fresh Start, 55 U. Cinn. L. Rev 449, 472 (1986).

A threshold inquiry that would better serve the competing interests of employer and employee would first determine whether the speech "clearly impairs" the government's ability to function. Impairment would be found when the speech would make it impossible for a government institution to carry out its duties or accomplish its legitimate objectives. For example, disclosure of military secrets would clearly impair the ability of the Defense Department to

function and perform its assigned duties in government. Speech of this nature should not be protected. The government in these cases should, however, bear the burden of proving the speech clearly impairs its ability to function. This would be appropriate because the government in effect is seeking to restrict and punish free speech. See Tinker v. Des Moines Indep. Community School Dist. 393 U.S. 503, 509 (1969).

That this case involves a police department should not on its face condone a more lenient application of this test. This Court has held before that police are not relegated to a watered-down version of constitutional rights. Garrity v. New Jersey, 385 U.S. 493, 500 (1967). The policy considerations behind a "clear impairment" inquiry would justify

permitting police to comment on matters of public importance when their comments do not prevent the ability of their agency to function. The integrity of a police department should be a paramount concern and speech exposing threats to that integrity is a legitimate competing interest and should be protected.

An additional inquiry should then be made whether the speech involves matters purely personal to the employee. What the employee has to gain personally from his employment by his speech would be reflected by his primary motivation. It is significant that this Court in Connick explicitly limited its holding such that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the

most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision..." 461 U.S. at 147, (emphasis added). This category of speech should likewise not be protected. This factor would eliminate most employment disputes from judicial review. The employee should bear the burden when this issue is raised to show his speech, in whole or in part, involves more than a purely personal dispute with his employer. If the court decides it does not, it should then defer to the judgment of the public employer in assessing the correctness of a personnel decision. If the speech involves more than a personal matter, the court should review the decision. For example, job performance evaluations would ordinarily not provide a subject

for protected speech as related solely to the employee. If, however, the employer was discriminatory in performing job performance evaluations for employees other than the employee in question, then an opinion that such job performance evaluations were discriminatory would be protected. Under this reformulation of the balancing test, all other speech would be constitutionally protected, subject only to the Pickering requirement that the interest of the employee and the public in free expression outweighs the interest of the governmental employer in managing and preventing actual disruption in the workplace. This categorization of speech would recognize that outside the nonprotected categories of "clear impairment" or speech "purely personal," the interest of the government in controlling

its employee's speech should not be significantly greater than its interest in limiting a similar contribution by any member of the general public. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 U.C.L.A. L. Rev. 1713, 1796 (1987). The nature and content of speech would be more important than a simple distinction of whether the employee has spoken as an employee or as a citizen, thus recognizing that all words spoken while in a public office are within the status of employee. A confusing factor in the present balancing test, in its use of the labels of employee and citizen, could then be eliminated. This reformulation would also recognize that even protected speech may be disruptive of the workplace, as would occur in any rigorous

debate of public issues, but even though disruptive, may predominate only when the evidence tips the scales in favor of free expression as opposed to the interests of the employer. This reformulation would provide clearer guidelines than the present "public concern" requirement, reduce the potentiality of substitution of individual judicial attitudes for interpretation of this fundamental right, give greater substance to prior judicial pronouncements that an employee does not lose his constitutional rights when he goes to work for the government, and recognize that the public has a legitimate and substantial interest in access to information from public employees for public discourse on important issues involving the operation and integrity of government institutions. Undoubtedly, no

one would be in a better position to comment on the operation of public offices than the persons most directly affected - the employees of that office. Pickering, 391 U.S. at 572. The public's right to know is a discrete interest favoring employee expression. Connick, 461 U.S. at 1684.

Here, Gillum's speech with respect to his beliefs the investigation was irregular and biased would not clearly impair the functioning of the KPD to perform its law enforcement function, or even prevent the completion of the investigation in question. The Respondents have contended an investigation was completed and a report given to Brown. The speech identified by Gillum was furthermore not related to any dispute about Gillum's employment, other than

spoken as an employee, but specifically concerned the operation and integrity of the KPD, and more specifically, not only its conduct of the internal investigation in question, but his belief that prior allegations of misconduct had not been investigated. Pickering suggests that any speech by a public employee concerning the "preferable manner of operating" a government institution is constitutionally protected. Pickering, 391 U.S. at 571.

The analysis of the lower courts of this speech should have proceeded to the Pickering balancing test for further scrutiny. Of course, the record shows that except for the conclusory statements made in the affidavit of Barrow in support of his motion for summary judgment, there was no evidence offered in support

of the motions for summary judgment of the Respondents that Gillum's speech in fact disrupted the operations of the KPD. There is likewise no evidence of on-going bickering, personality conflicts or policy disputes between Gillum and his superiors that were disruptive of the KPD, nor have the Respondents attempted to show Gillum's limited comments concerning morale or paperwork requirements in the tape transcripts was disruptive of the KPD. Indeed, the evidence is that Gillum's speech was not disruptive. Barrow agrees an investigation of allegations of misconduct would be more important than the efficiency of the KPD. R. at 972 Dickerson, now the Chief, knew of no disruption caused by the investigation of such allegations. R. at 226. This speech could not have effected the

proper functioning of the KPD since the statements were made for the reason the KPD was not functioning properly in conducting the investigation.

Without a reformulation of the balancing test, the unfairness in the result of this case may be repeated again in cases involving the millions of public employees who serve the citizens of this country. Speech on public issues has traditionally occupied the "highest rung of the hierarchy of First Amendment values." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982). However, if a confusing and unclear test remains to determine protected speech, the lower courts will continue to conflict in making the threshold inquiry now required, public employees will be treated unequally and there will be an inevitable

chilling effect on public employees who might otherwise be critical of the operation of governmental institutions. If such employees choose not to speak, the public will as a consequence be deprived of valuable political and social information. This Court should act now to address this important issue.

II.

MISAPPLICATION OF CONNICK AND RANKIN

The Court of Appeals has misapplied Connick and Rankin in two ways. First, it has expressly chosen to ignore two principles that are fundamental elements of the test devised by Connick. In stating that for its analysis it would look at the "hat worn by the employee when speaking rather that the importance of the issue," (App. p.11) the Court of Appeals ignores that all speech of the

public employee at the workplace will have occurred under his "hat" as an employee. Status has, in effect, been given more emphasis by the Court of Appeals than content. That was not the holding in Connick, nor in Rankin. Of course, the confusion caused by the use of the labels "employee" and "citizen" in Pickering and Connick, as discussed earlier, may have lead the Court of Appeals to err in the proper application of the balancing test.

The Court of Appeals, in citing Terrell v. University of Texas System Police, 792 F.2d 1360 (5th Cir. 1986) to support its determination that Gillum did not speak on a matter of public concern, has also decided Connick, 103 S.Ct. at 1691 n. 8 suggested that speech on a matter of public concern must not be tied

to a personal employment dispute. Terrell, at 1363. Gillum would argue this misreads the holding in Givan v. Western Line Consol. School District, 439 U.S. 410, and Connick. Much of critical speech can have mixed issues of both public and private concern and that alone is not grounds for such speech to lose protected status. See Thompson v. City of Starkville, Miss., 901 F.2d at 464; Wulf v. City of Wichita, 883 F.2d at 860. Only a portion of the speech need address a matter of public concern. Connick, 461 U.S. at 149. The Court of Appeals further stated in its opinion "We are chary of an analytical path that takes judges so uncomfortably close to content based inquiries." App. p.11. It is expressly the holding of Connick that "content" of the speech at issue must be

reviewed. That is especially important here, because the speech offered by Gillum as implicating a matter of public concern, by its very content does not impact his job performance, but is instead his opinion of the irregularity of the investigation and the bias of the assigned investigator. He had nothing to gain personally from such statements, only the risk of possible retaliation by his superiors. His primary motivation was to draw attention to matters beyond his own self-interest. See Gillum Affidavit, App. p.158. The lower court's focus on solely his refusal to provide a written statement when requested after his suspicions were aroused by the change in "position" ignores the context and content of his speech as related to the predominant issue of whether the

investigation was irregular and biased. The latter issues were the "point" of his speech. Surely, if as everyone in this case has agreed, the possible misconduct of Barrow is rightfully a matter of public concern, then whether an investigation of such allegations of misconduct was properly and impartially conducted, should likewise be a matter public concern.

Gillum argues that he presented sufficient facts to raise a factual dispute as to whether the matters he spoke out on were of public concern. Factual disputes would also exist as to whether he was terminated for his speech. In accordance with the federal law governing the disposition of summary judgment motions, greater deference should have been afforded Gillum by the

lower courts in deciding whether his speech involved matters of public concern. The evidence produced by Gillum should have been viewed drawing all reasonable factual inferences in his favor. Little v. Liquid Air Corp., 952 F.2d 841 (5th Cir. 1992). See the Order. App. pp. 40-43. At this stage of trial proceedings, the role of the judge was not to weigh the evidence and determine the truth of the allegations in question but rather to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

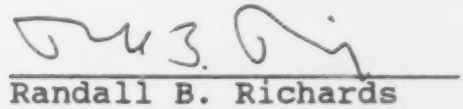
The Court of Appeals has misapplied the teachings of Connick and Rankin. This departure from the analytical framework established in such decisions has in effect more narrowly construed "speech"

for purposes of First Amendment analysis than has been before sanctioned by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision of the United States Court of Appeals for the Fifth Circuit should be reversed, and this case remanded for further proceedings.

Respectfully submitted,



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COUNSEL FOR PETITIONER

In The

Supreme Court of the United States

October Term, 1993

David Gillum,

Petitioner,

v.

The City of Kerrville, Texas, Glenn D. Brown, in his official capacity as City Manager and his individual capacity, Louis A. Barrow, Jr., in his official capacity as Police Chief, and in his individual capacity, Kirk McCarley, in his official capacity as Personnel Director and in his individual capacity,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO THE PETITION
FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8006

David Gillum,

Plaintiff-Appellant,

versus

THE CITY OF KERRVILLE, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

---

Before GOLDBERG, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:

David Gillum filed this 42 U.S.C. § 1983 suit against Kerrville, Texas, a city that once employed him as a policeman, and three of its officials, City Manager Glenn D. Brown, Police Chief Louis A. Barrow, Jr., and Personnel Director Kirk McCarley, claiming that he was

fired in violation of his federal constitutional rights to free speech and due process, and in violation of state constitutional and common law rights and duties. Holding that these claims did not have merit, the district court granted summary judgment. We affirm.

I

In early August 1990, David Gillum was a policeman with the Kerrville Police Department. A "reliable" confidential informant told Gillum that Police Chief Louis Barrow had "smoked dope" with Cheryl Schilling, a woman with a criminal record. Gillum asked Joe Lanning, Chief of the Internal Affairs Division, how to proceed. Then, in an attempt to follow requirements for reporting and conducting internal investigations of police officers, as reflected in the department's

Procedural Order No. 90-06, Gillum reported the information to Rosie McCray, his commanding officer. Procedural Order No. 90-06 provided that an internal affairs officer must investigate all allegations of police misconduct; it did not specifically treat investigations of the police chief.

Lanning authorized Gillum to interview Schilling. Lanning also told Chuck Dickerson, his superior officer, and Kirk McCarley, the city personnel director, about the allegations, and that Gillum would interview Schilling. Gillum reported that Schilling denied smoking dope with Barrow, but admitted drinking a beer and discussing her recent arrest with him. Lanning then authorized Gillum to interview Debbie Vasquez, another witness identified by Schilling.

Lanning then told Barrow about the situation. The record does not reflect Barrow's response, but Lanning then told Gillum that he would no longer have a role in the investigation, and that he should submit a written statement about the matter. At this point, Gillum says, he began to suspect that his superiors wanted to stonewall the investigation, a point confirmed in his mind when he was summoned to a meeting with Barrow, MCCarley, Lanning and McCray.

During this meeting, Gillum was told that Internal Affairs would conduct a formal investigation. Gillum however, was worried that the Chief had been told about the Internal Affairs investigation before the filing of a formal complaint. He commented that he did not think that Internal Affairs could conduct an impar-

tial inquest, and speculated that Barrow and the others would either suspend him until he could acquiesce in the formal investigation or fire him altogether. Gillum stated that he did not want to quit his job, but wanted to return to normal police work. The meeting ended when Gillum placed his badge and gun on the desk and left the room, stating, "I won't compromise this badge." Gillum asserts that he did so because he suspected that he was being ordered to participate in a coverup.

As he left the police station, Gillum told Larry Rhodes, the police dispatcher, that he did not quit. Gillum did not clean his locker but reported to work on his next scheduled day. His name was not on the duty roster. When he inquired, McCarley and Barrow told Gillum

that he had quit and no longer worked for the Kerrville Police Department. Gillum requested a hearing on his status with the police force in a letter to McCray. Gillum was given a hearing before McCray and Barrow under rules for fired employees.

Gillum was not reinstated and appealed to Glenn Brown, the city manager. Brown held a hearing. Gillum requested that the hearing be open, but it was closed. Gillum also requested that Lanning attend the hearing, but Lanning did not. However, Brown offered reinstatement with the Kerrville Police Department without compensation for time off the duty roster. Not satisfied, Gillum filed this suit. Kerrville offered Gillum a name clearing hearing, but he did not attend.

In the district court, Gillum argued that he was fired for expressing his opinion about the investigation of Barrow, and for refusing to participate in a conspiracy to stonewall the investigation. Gillum maintained that his firing violated his right to free speech under the First Amendment to the U.S. Constitution, and under Article I, Section 8, of the Texas Constitution. Gillum also argued that he was denied a meaningful opportunity to clear his name, in violation of his right to due process under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Gillum also filed claims for defamation and intentional infliction of emotional distress and conspiracy to deny his civil rights in violation of 42 U.S.C. § 1983. Gillum demanded compen-

satory damages for lost wages and earning capacity, past and future mental anguish, severe emotional distress, future medical expenses, loss of reputation, punitive damages for conscious disregard of his rights, attorneys' fees under 42 U.S.C. §1988, and declaratory and injunctive relief. The district court granted summary judgment to defendants. Gillum appealed.

II

We cannot affirm a summary judgment unless "there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the evidence, as well as inferences that may be drawn from the evidence, in the light most favorable to the party that opposed the motion. Little v. Liquid Air Corp., 952 F.2d 841, 847 (5th Cir. 1992).

III

Gillum argues that a reasonable jury could find a violation of his right to free speech under the First Amendment because he was fired for speaking to his superior officers about police corruption. Of course, the state cannot fire an employee for exercising the right to speak on matters of public concern. Connick v. Meyers, 461 U.S. 138, 147 (1983); Pickering v. Board of Educ., 391 U.S. 563, 574 (1968).

The district court held that though allegations of misconduct by Barrow were a matter of public concern, Gillum did not prove that he spoke or engaged in expressive conduct within the contemplation of the First Amendment. It also held that even if Gillum engaged in protected speech or expressive conduct, he

could not invoke the First Amendment as his speech or expressive conduct imposed an impermissible burden on the proper administration of the workplace.

Whether Gillum quit the police force or lost his job for insubordination was on this record a question of fact. We are not persuaded, however, that Gillum's right to free speech as an employee protected him from being fired for the expressive conduct he has pointed to.

In Terrell v. University of Texas Sys. Police, 792 F.2d 1360 (5th Cir. 1986), cert. denied, 479 U.S. 1064 (1987), we did not focus on the inherent "importance" of the subject matter of the speech, but on the extent to which the terminated employee spoke as a citizen or employee. In Terrell, as in this case, the employee did not speak as a citizen,

but as an employee embroiled in a personal employment dispute. Id. at 1363. This focus on the hat worn by the employee when speaking rather than upon the "importance" of the issue reflects the reality that at some level of generality almost all speech of state employees is of public concern. Relatedly, we are chary of an analytical path that takes judges so uncomfortably close to content based inquires.

Whether Barrow broke the law is of public concern, but that was not Gillum's focus. Instead, Gillum disputed his role in the internal investigation. To be sure, corruption in an internal affairs department is a matter of public concern. Gillum's focus was, however, on this issue only insofar as it impacted his wish to continue his investigation.

Gillum was not told to withhold any information he had. To the contrary, he was told to put it in writing, and subsist from his investigation. That Gillum did not think that adequate adds nothing. Had he submitted his statement and later found that it was ignored, he might have complained or "gone public." Firing Gillum for those acts would have presented a quite different case.

IV

Gillum argues that he was denied a name clearing hearing in violation of his due process right to work in a chosen profession. Gillum must prove (1) that he was discharged; (2) that defamatory charges were made against him in connection with the discharge; (3) that the charges were made public; (4) that the charges were false; (5) that he requested

a hearing in which to clear his name; (6) that the request was denied; and (7) that no meaningful public hearing was conducted before the discharge. Rosenstein v. City of Dallas, 876 F.2d 392 (5th Cir. 1989), aff'd on relevant grounds, 902 F.2d 91 (en banc) (per curiam), cert. denied, 498 U.S. 855 (1990).

-1-

Gillum argues that Brown, McCarley, and Barrow published defamatory statements in the Kerrville Daily Times in connection with his discharge. The alleged defamatory statements appeared on September 30, 1990, during the administrative appeals process. The statements concerned Gillum's dispute with the Kerrville Police Department and appeared in a news account of the administrative proceedings.

The threshold question is whether there is a sufficient nexus between the alleged defamatory statements and the discharge, as required by Siegert v. Gilley, 111 S.Ct. 1789 (1991). It is apparent that these statements were sufficiently tied to Gillum's termination. The statements were about his termination and were made while the administrative process was in play. It does not follow, however, that Gillum has a claim that he was deprived of any constitutionally secured rights.

The difficulty with Gillum's claim is that his initial "firing" was subject to an administrative appeals process. The result of that process was tender of reinstatement, which Gillum declined. It is true that the process took from mid-

August until the end of September and the city declined to pay Gillum for the interim period. We cannot conclude,however, that the defendants impaired Gillum's employment opportunities sufficiently to deprive him of constitutionally secured liberty interests. Gillum was given an opportunity to be heard and prevailed. Gillum cannot create a constitutional claim by declining to return to work. The district court granted summary judgment because Gillum declined reinstatement. We agree.

V

Gillum argues that his discharge violated Article I, Section 8, of the Texas Constitution, which provides in relevant part that "[e]very person shall be at liberty to speak, write or publish his opinions on any subject, being res-

ponsible for the abuse of that privi-lege." Tex. Const. of 1876, art. I, § 8 (1955). The district court held that no cause of action for damages could be assessed for violation of Article I, Section 8, and that finding no violation of the First Amendment precludes finding a violation of Article I, Section 8.

Texas courts have not recognized a violation of Article I, Section 8, as an actionable constitutional tort. One Texas Court of Appeals has stated that "Texas has a strong bill of rights, but ...no Texas statute or case...provides a citizen the kind of redress afforded by 42 U.S.C. § 1983 or by Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics. There is no state constitutional tort." Bagg v. University of Tex. Medical Branch, 726 S.W.2d 582,

584 n.1 (Tex. App.--Houston [14th Dist.] 1987. writ ref'd n.r.e.) (citations omitted); see also City of Houston v. Leach, 819 S.W.2d 185 (Tex. App.--Houston [14th Dist.] 1991, no writ). But see Jones v. Memorial Hosp. Sys., 746 S.W.2d 891 (Tex. App.--Houston [1st Dist.] 1988, no writ) (implicitly recognizing actionable constitutional tort in reversing summary judgment in case involving Article I, Section 8).

Gillum reads Bagg as holding that though he cannot recover damages under Article I, Section 8, against a governmental unit of the state, employees remain personally liable for wrongdoing. As we read it, Bagg holds that government employees cannot be liable for doing their job. Brown, McCArley, and Barrow were about their official duties in con-

sidering how to proceed in the internal investigation, and how to deal with a police officer who resisted their determination.

VI

Gillum charges that Brown, McCarley, and Barrow made false and defamatory statements published in the Kerrville Daily Times that injured his reputation. We have held that "defamation of a police officer by city officials in the course of discharging that police officer is protected under the city's governmental immunity and, as an exercise of a governmental function, is not actionable either against the city or the state officials under state slander law." Rosenstein, 876 F.2d at 397 (citing City of Dallas v. Moreau, 718 S.W.2d 776, 779-80 (Tex. App.--Corpus Christi 1986, writ n.r.e.).

On this basis, the district court concluded that both the city and its officials are not liable for defamation as a matter of law.

In Moreau, the court found immunity not only for the city but also for its officers who published information concerning a policeman's dismissal from the police force. Id. at 779. After holding that "appellant city was immune from the libel cause of action by appellee for publishing a letter of discharge as a matter of law," the court noted, "[t]his reasoning also applies to the cause of action (if such exists) for appellant's employees' acting without proper motive and without due care and diligence in the performance of their official duties in regard to the act of posting the termination letter on the bulletin board." Id.

at 779-80. We have located no Texas case concerning comments to the press about a discharge. The facts of this case resemble those in Moreau, and we are not persuaded that Texas courts would conclude that these responses to press inquiries are ultra vires.

VII

Gillum alleges that Brown, McCarley, and Barrow intentionally caused him emotional distress. To prevail in this claim, Gillum has to demonstrate that (1) the defendant acted intentionally and recklessly; (2) the conduct was "extreme and outrageous;" (3) the actions of the defendant caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. Dean v. Ford Motor Credit Co., 885 F.2d 300, 306 (5th Cir. 1989); Bushell v.

Dean, 781 S.W.2d 652, 657 (Tex. App.--Austin 1989), rev'd in part on other grounds, 803 S.W.2d 711 (Tex. 1991); Tidelands Auto Club v. Walters, 699 S.W.2d 939, 942 (Tex. App.--Beaumont 1985 writ ref'd n.r.e.)

We have interpreted the term "outrageous" to mean surpassing "all possible bounds of decency," such that it is "utterly intolerable in a civilized community." Dean, 885 F.2d at 306 (quoting Restatement (Second) of Torts § 46, Comment d). Given this framework, the district court correctly granted summary judgment, as Gillum failed to demonstrate that any of the defendants acted in an outrageous way. Their statements provided either accurate descriptions of the Gillum controversy, or at worst hyperbolist ramblings.

Gillum has not demonstrated that his superiors either surpassed the bounds of decency or contravened the standards of a civilized community.

The district court correctly observed that Section 101.057 of the Texas Civil Practices and Remedies Code provides that any limited waiver of sovereign immunity does not apply where the claim arises out of an intentional tort. Tex. Civ. Prac. & Rem. Code Ann. § 101.057 (West 1986). This provision shields municipalities from suits arising out of intentional torts committed by governmental employees, City of Waco v. Hester, 805 S.W.2d 807, 810-12 (Tex. App.--Waco 1990, writ denied), and should be liberally construed to accomplish this objective. Robinson v. Central Texas MHMR Center, 780 S.W.2d 169,170 (Tex.

1989).

VIII

Gillum advances a wrongful termination claim based on a common law exception to the "at will" employment doctrine. He argues that he had a good faith belief that he would be required to perform an illegal act of omission or commission, acquiescence or participation in an attempt to conceal Barrow's alleged recreational drug use, and as such should not have been terminated for his refusal to follow formal investigative procedures. The district court granted summary judgment on this claim, holding that Gillum could not have held such a good faith belief after he received an offer to provide a written statement concerning his investigation, an offer of reinstatement, and an offer of a name clearing

hearing. We agree.

IX

Gillum attacks the dismissal of his claim of civil conspiracy to violate his constitutional rights to free speech and due process. The district court denied this claim because Gillum's constitutional rights had not been violated, so that no basis existed for assigning liability for conspiracy. As we have noted, "it remains necessary to prove an actual deprivation of a constitutional right; a conspiracy to deprive is insufficient." Villanueva v. McInnis, 723 F. 2d 414, 418 (5th Cir. 1984).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8006

D.C. Docket No. SA-91-CV-90

David Gillum,
Plaintiff-Appellant,

versus

THE CITY OF KERRVILLE, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before GOLDBERG, HIGGINBOTHAM, and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

September 16, 1993

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DAVID GILLUM	§	
	§	
V.	§	
	§	
THE CITY OF KERRVILLE, TEXAS, GLENN D. BROWN, in his official capacity as City Manager and in his individual capacity, LOUIS A. BARROW, JR. in his official capacity as Police Chief, and in his individual capacity, KIRK MCCARLEY, in his official capacity as Personnel Director, and in his individual capacity	§	CIVIL ACTION NO. SA-91-CA-0090 November 30, 1992

ORDER

Came on to be considered a multitude of dispositive motions filed in the above styled and numbered cause. This civil rights suit was originally filed on March 12, 1991. Defendant Louis A. Barrow ("Barrow") filed a Motion to Dismiss on June 12, 1991, and a Supplemental Motion

to Dismiss on July 12, 1991.[1] The remaining Defendants -- The City of Kerrville ("the City"), Glenn D. Brown ("Brown"), and Kirk McCarley ("McCarley") -- filed a Motion for Summary Judgment on April 10, 1992.[2] Brown and McCarley filed a second Motion for Summary Judgment Based Upon Qualified Immunity on September 28, 1992.[3] Barrow also filed a motion for summary Judgment on September 28, 1992.[4] An Agreed Pretrial

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[1]Plaintiff responded to these motions on June 27, 1991, and July 25, 1991, respectively.

[2]Plaintiff responded to this motion on April 27, 1992. The City, Brown and McCarley replied to this Response on May 5, 1992.

[3]Defendants filed this motion despite having previously filed a Motion for Summary Judgment on April 10 1992.

[4]Plaintiff responded to both of these September 28th motions on October 13, 1992.

Order was received on October 14, 1992.

I. Background

On or about August 1, 1990, the Plaintiff, David Gillum, began investigating allegations of misconduct against the Kerrville Chief of Police, Louis A. Barrow. The Plaintiff asked the Chief of the Internal Affairs Division ("Lanning") for guidance on how to handle information he had received from a reliable confidential informant that a woman with a criminal record had been overheard bragging about "smoking dope" with Barrow. The Plaintiff states that he first reported this to his commanding officer ("McCray"), with the hope that this would be in compliance with Procedural Order No. 90-06 ("Order"). Barrow had promulgated this Order after becoming Chief. It outlined the

procedural requirements for reporting and conducting an internal investigation of fellow officers. It did not address investigations of the Chief. Lanning authorized the plaintiff to interview Cheryl Shilling ("Shilling"), the woman who allegedly "smoked dope" with Barrow. The Plaintiff reported that Shilling denied "smoking dope" with Barrow, but admitted knowing Barrow, having drunk a beer with him, and having discussed her recent arrest with him. Shilling had a criminal record for drug use and had recently been arrested for delivery of methamphetamines. Lanning notified his supervisor, Lt. Chuck Dickerson ("Dickerson"), and the personnel director, McCarley, about the Plaintiff's investigation.

Lanning then told the Plaintiff that he would no longer have a role in the

investigation, and that he should make a written statement. Lanning had already informed Barrow about the allegations against him. The Plaintiff was shortly thereafter summoned back to the police station for a meeting in Barrow's office with Barrow, McCarley, Lanning, and McCray.

What occurred in this meeting on August 2, 1990, is in dispute. Defendants allege that Plaintiff quit by placing his gun and badge on Barrow's desk and walking out. Plaintiff alleges that he stated three times that he did not intend to quit. Plaintiff further alleges that Barrow ordered Plaintiff to cooperate in clearing his name or else he would be fired. Plaintiff alleges that when he next reported to work, McCarley and Barrow informed him that he had quit,

and he was no longer employed by the KPD. It is undisputed, however, that Plaintiff told dispatcher Larry Rhodes that he had not quit, and Plaintiff did not clean out his locker August 2, 1990. It is also undisputed that Plaintiff never submitted a formal resignation.

Plaintiff then requested a hearing in a letter to McCray dated August 7, 1990. A hearing was held on September 12, 1990, before Barrow and McCarley. Plaintiff appealed the decision of Barrow and McCarley to Brown, the city manager. A closed hearing was held before Brown on October 4, 1990, despite the Plaintiff's request that the hearing be open. Plaintiff requested that Lanning be present at the hearing, but Barrow said that he was unavailable. As a result of this hearing, Brown sent a letter to

Plaintiff, dated October 22, 1990, offering the Plaintiff reinstatement to the KPD, but without backpay from August 2, 1990 to October 22, 1990.

The Plaintiff, not happy with this result, filed suit on January 25, 1991. The City offered a name clearing hearing on March 15, 1991. Plaintiff alleges that the Defendant made defamatory remarks to the press concerning him, and that his civil rights had been violated because he was discharged for exercising his constitutional rights.

On February 24, 1992, the Plaintiff was convicted of the felony offense of aggravated assault of a peace officer with a deadly weapon. As a result of this conviction, Plaintiff was sentenced to five years confinement with the period of confinement suspended for five years

during probation. The Plaintiff was acquitted of a charge of kidnapping arising from the same incident. As a result of this felony conviction, Plaintiff can no longer be employed as a police officer.

In general, the Plaintiff claims that he was discharged from his employment with the KPD in retaliation for expressing his opinions and complaints concerning an investigation into alleged misconduct by Barrow, and for refusing to participate in what he believed was a cover-up of the incident. He alleges that this violated his right to free speech under the First Amendment of the United States Constitution, and Article I, § 8 of the Texas Constitution.

He further alleges that he was denied a meaningful opportunity to clear

his name of the stigma inflicted by the Defendants on his reputation, and that this violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, § 9 of the Texas Constitution.

He also asserts state causes of action for defamation, and negligent and intentional infliction of emotional distress against Defendants Barrow, Brown, and McCarley.

He states that these Defendants engaged in a conspiracy to violate his civil rights, all in violation of 42 U.S.C. § 1983, and that the Order was an unconstitutional infringement of his First Amendment rights.

Finally, with regard to damages, Plaintiff argues that he is entitled to lost wages, loss of earning capacity,

past and future mental anguish, severe emotional distress, future medical expenses, and loss of reputation proximately caused by the wrongful conduct of the Defendants, jointly and severally; punitive damages against the individual Defendants for their conscious disregard of his rights; attorneys' fees under 42 U.S.C. § 1988 for violation of his civil rights; and declaratory and injunctive relief.

In general, the City, Brown, and McCarley claim that the Plaintiff was given a choice to follow department procedure for investigating misconduct by a member of the department, or to resign; the choice given to the Plaintiff was not motivated by or in retaliation for his expression of any opinion or views; Plaintiff refused to follow department

policy, and instead followed his own course of conduct; he does not have a First Amendment right to proceed independently in this manner; and that any public statements made were not defamatory, but were made with a reasonable and good faith belief in their accuracy.

Defendants further assert that there is no cause of action for negligent infliction of emotional distress in an at will employment relationship. They also assert that Article I, § 8 of the Texas Constitution does not create an independent cause of action for damages. They next argue that the Defendants' decision to reinstate the Plaintiff to his position precludes any recovery for personal or economic injury after his refusal to go back to his former

position, either as a result of no mitigation of damages, a failure of proximate cause, or the lack of any final action or wrong to the Plaintiff. Finally, they assert that the Plaintiff's subsequent criminal activity is a new and intervening cause that precludes recovery for personal or economic damages resulting from the conviction itself or the underlying acts.

In general, Barrow claims that he has not violated any established constitutional, statutory, or common law rights of the Plaintiff. He alleges that at all times relevant to this lawsuit, he acted in his official capacity as Chief of Police. As such, he claims that he was not a policy maker for the City regarding hiring and firing of municipal employees. All his actions were in good

faith and within his legal and administrative authority. He asserts defenses of sovereign immunity, governmental immunity, qualified immunity, good faith immunity, and official immunity. Barrow further asserts that Plaintiff's claim is frivolous and should be dismissed as such pursuant to Rule 12(b)(6).

II. Motion to Dismiss Standard

A motion to dismiss under Rule 12 (b)(6) "is viewed with disfavor and is rarely granted." Kaiser Aluminum and Chemical Sales, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982) quoting 5 C. Wright and A. Miller, Federal Practice and Procedure § 1357 at 598 (1969). It is well settled that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff

can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson. 355 U.S. 41, 45-46 (1957); Boudeloche v. Grow Chemical Coatings Corps., 728 F.2d 759, 762 (5th Cir. 1984); Kaiser, 677 F.2d at 1050. When considering such a motion, the complaint must be liberally construed in the plaintiff's favor, and all facts pleaded in the complaint should be accepted as true. Campbell v. Wells Fargo Bank, N.A., 781 F.2d 440,442 (5th Cir. 1986). "The question therefore is whether in the light most favorable to Plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5 Wright and Miller, Federal Practice and Procedure, Section 1357 at 601. While this law is accurate, it should be pointed out that

the procedural requirements are somewhat heightened in a § 1983 cause of action. The Plaintiff must set forth specific factual allegations in his Complaint which are necessary to sustain the conclusion that Defendants' conduct violated clearly established law. Conclusory allegations alone are insufficient. Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985).

III. Summary Judgment Standard

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case." Impossible

Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir. 1982).

In determining whether the movant has met its burden, the Court must view the evidence introduced and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment. See id. at 1031. All reasonable doubts as to the existence of a genuine issue of material fact must be resolved against the movant. See id. at 1031; Jones v. Western Geophysical Co. of America, 669 F.2d 280, 283 (5th Cir. 1982). When determining whether to grant summary judgment, the Court is merely determining whether a factual dispute exists and may not resolve those disputes. See Jones, 669 F.2d at 283. The fact that it appears to the Court

that the non-movant party is unlikely to prevail at trial or that the movant's statement of facts appears more plausible is not a reason to grant summary judgment. See id. at 283.

Once the movant has shown the absence of material factual issues, the opposing party has a duty to respond with any factual assertion that would preclude summary judgment. See Kleckner v. Republic Van & Storage Co., 556 F.2d 766, 771 (5th Cir. 1977). Rule 56(e) of the Federal Rules of Civil Procedure provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." In this respect, the burden on the non-moving party is not especially heavy; however, he must show specific facts that present a genuine issue of material fact worthy of trial rather that showing mere general allegations. See Gossett v. Du-Ra-Kel Corp., 569 F.2d 869,872 (5th Cir. 1978).

IV. Discussion

A. Motion to Dismiss -- Barrow:

Barrow asserts that Plaintiff has failed to state a claim for deprivation of his liberty interest because Plaintiff received tow full "name clearing" type hearings upon request, and Plaintiff failed to attend a third "name clearing"

hearing which was offered. Therefore, Barrow claims that as a matter of law Plaintiff's Fourteenth Amendment due process rights have been afforded him. Barrow next argues that there is no cognizable liberty interest in reputation alone, and that absent a claim of "some injury to employment or employment opportunities, in addition to an injury to reputation, and subsequent denial of procedural due process to redress the injury," a constitutional claim for deprivation of liberty has not been made. Barrow further asserts that Plaintiff has not demonstrated that the "speech" was clearly a matter of public concern, and therefore Plaintiff cannot prove a set of facts entitling him to relief under the First Amendment. Barrow next states that he is entitled to immunity for his

actions, and that Plaintiff's claims of conspiracy are not supported by the facts.

The Court is of the opinion that Barrow has insufficiently established a right to dismissal under the standard established for Rule 12(b)(6) motions. As stated above, these motions are viewed with disfavor and are rarely granted. Barrow has asserted allegations that need evidence to support them. Therefore, this Court believes that Barrow's subsequent summary judgment motion is the proper vehicle for voicing such defenses and claims. Accordingly, the Court is of the opinion that Defendant Barrow's Motion to Dismiss and Supplemental Motion to Dismiss lack merit and should be denied.

B. Motion for Summary Judgment -- The

City of Kerrville, Brown, and McCarley:

1. First Amendment:

Defendants first assert that Plaintiff has not alleged a cognizable constitutional right to free speech under the First Amendment. In particular, Defendants state that "there is no First Amendment right to conduct an investigation into the conduct of a superior officer in a paramilitary organization such as a police department." Motion at 3. Defendants do not support this contention with any authority, and the Court does not know of any such authority.

Defendants next assert that under the two prong test of Dennison v. County of Frederick, 921 F.2d 50 (4th Cir. 1990), the Plaintiff has failed to establish that (a) speech or expressive conduct was involved, and (b) the speech

was of a protected type (i.e., was of "public concern". In Dennison, a county building inspector sued the county alleging that he was constructively discharged in violation of his civil rights because of conflicts he had with city officials over how strictly to enforce the city's building code. The Fourth Circuit upheld the district court's summary judgment for the defendant, holding that the plaintiff failed to identify any "speech" for which he was discharged. Moreover, the Court held that even assuming that the plaintiff's conduct constituted "speech," the speech was not a matter of public concern, and therefore was undeserving of constitutional protection. The Court admitted that if building safety was at issue, it might have amounted to a matter

of public concern, but the plaintiff never so alleged.

The Plaintiff argues that in Brawner v. City of Richardson, 855 F.2d 187, 191 (5th Cir. 1988), the Fifth Circuit held that a public employee may not be discharged for exercising his right to freedom of speech on matters of public concern. The Plaintiff alleges that allegations of misconduct on the part of the Chief of Police of Kerrville, as in Brawner, does amount to speech of public concern. He further argues that public concern is implicated if the information conveyed is of relevance to the public's evaluation of the performance of governmental agencies. Coughlin v. Lee, 946 F.2d 1152, 1156-57 (5th Cir. 1991). Such concern is plainly implicated in this case.

This Court is of the opinion that alleged misconduct by the Chief of Police is clearly a matter of public concern. That alone, however, does not end the inquiry. This Court must make the initial determination of whether the Plaintiff has alleged sufficient facts to constitute "speech," or expressive conduct cognizable as "speech." The Defendants point out in their Reply that this is not a case where the Plaintiff "went to the District Attorney, Texas Rangers, the City Council, the Mayor, or the City Manager (as was the case in Brawner)." Reply at 3. Instead, Defendants argue that this is a case where the Plaintiff refused to cooperate in an internal investigation according to Department's internal procedure; Defendant defied his superiors and carried out his own inves-

tigation illegally.

Plaintiff ignores this first element of the two part test. He totally focuses upon the accurate statement that police misconduct is a matter of public concern. He then states that the Defendant's assertions that his actions did not amount to "speech" are meritless. He does not say why such allegations are meritless. This Court is of the opinion that Plaintiff has not established that his rights to free speech were violated. Even accepting his allegations in his Complaint as true, as this Court must do, he has alleged no facts which constitute "speech." In Brawner, the speech at issue was a letter to the City Manager and the Mayor. As in Dennison, the present case involves a dispute over a general course of conduct, not the

expression of any idea or opinion. The Plaintiff "never evinced an intent to convey a particularized message" which was relevant to the public. Dennison at 54. Rather, he properly reported the potential misconduct to the appropriate authorities, and was subsequently unhappy with the results. He did not go the press, or to the city officials; he just continued the investigation himself. As indicated in the Supplemental Record References filed by the Defendants, the Plaintiff reported these incidents with the sole purpose of asking for advice about what to do. He did not contact an outside agency to report the misconduct. When asked to make a written report, he even refused to do so.

Even assuming arguendo that his conduct did amount to speech, moreover,

it was not protected under the balancing test reiterated in Dennison and Kinsey v. Salado Independent School District, 950 F.2d 988, (5th Cir. 1992). His discharge did not violate the First Amendment as a matter of law because no "speech" was involved. Accordingly, Defendants motion should be granted with regard to the First Amendment issue.

2. Cause of Action for Damages Under Art. I, § 8:

Defendants next argue that there is no right to damages under Article I, Section 8, of the Texas Constitution analogous to a Bivens action under the First Amendment. As set forth above, Plaintiff has not established any "speech" cognizable under the First Amendment. Likewise, he has not established it for purposes of Article I,

§ 8, analysis. The Defendant also correctly points out, moreover, that there is no independent cause of action under this provision. Accordingly, Defendants motion should be granted with regard to the Article I, § 8, issues.

3. Deprivation of Liberty Without Due Process of Law:

Defendants next assert that none of the pleaded statements alleged to be made in the course of Plaintiff's termination rises to the level of a "badge of infamy," thus destroying the Plaintiff's ability or chances to engage in the legitimate pursuit of employment. Moreover, Defendants assert that Plaintiff was given the opportunity to clear his name in two separate hearings, and in a third hearing which Plaintiff refused to attend.

Plaintiff argues that he was clearly discharged from public employment under circumstances that put his reputation, honor, and integrity at stake. Under such circumstances, one has a constitutional right to clear his name in a public hearing. Rosenstein v. City of Dallas, 876 F.2d 392, 395 (5th Cir. 1989), aff'd on relevant grounds, 901 F.2d 61 (en banc) (per curiam), cert. denied, 111 S.Ct. 153 (1990). Moreover, a person can recover monetary damages for such a violation of liberty under § 1983. Id. Plaintiff asserts that the hearing before Brown was a sham. He further claims that he requested an open hearing, and was denied the same. He also states that Lanning was not present at the hearing despite Plaintiff's request.

In Rosenstein, the Fifth Circuit

held:

> It is now beyond any doubt that discharge from public employment under circumstances that put the employee's reputation, honor or integrity at stake gives rise to a liberty interest under the Fourteenth Amendment to a procedural opportunity to clear one's name...Moreover, the process due such an individual is merely a hearing providing a public forum or opportunity to clear one's name, not actual review of the decision to discharge the employee. [In such a case,] the individual may recover monetary damages under § 1983 for the deprivation of his liberty under the Fourteenth Amendment. To succeed on this § 1983 claim for the denial of a name-clearing hearing, the employee must prove the following: that he was discharged, that defamatory charges were made against him in connection with the discharge, that the charges were false, that no meaningful public hearing was conducted pre-discharge, that the charges were made public, that he requested a hearing in which to clear his name, and that the request was denied.

Id. at 395-96

It is undisputed that hearing was held before Brown, and the Plaintiff was offered his job back. Moreover, the City later offered a formal name clearing hearing, albeit after this litigation commenced, and the Plaintiff refused this avenue, presumably choosing to pursue this cause of action instead. The Plaintiff alleges significant reputational injury such that he could not gain suitable employment following his discharge. This Court is of the opinion that he has not established the significant reputational injury as a matter of law. He was offered his own job back, and refused to accept it on the grounds that they refused to provide him back-pay. He clearly had suitable employment opportunities after the

alleged discharge; he could have gotten his old job back. Therefore, this Court is of the opinion that summary judgment should be granted with regard to the liberty interest issue.

4. Defamation:

Defendants Brown and McCarley next argue that the alleged statements made by them were not defamatory as a matter of law.[5] They allege that they were simply hyperbole and opinion, not factual misstatements. Defendants proceed, in their Motion and Reply, to demonstrate why these statements were not defamation.

In Rosentein v. City of Dallas, 876 F.2d 392 (5th Cir. 1989), the Fifth Circuit Court of Appeals held that "defamation of a police officer by city

---

[5]Plaintiff's defamation cause of action only pertains to Defendants Brown, Barrow, and McCarley.

officials in the course of discharging that police officer is protected under the city's governmental immunity and, as an exercise of a governmental function, is not actionable against either the city or the officials under state slander law." Rosentein at 397 (quoting City of Dallas v. Moreau, 718 S.W.2d 776, 779-80 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.). Therefore, this Court is of the opinion that both the city and the city officials are not liable for defamation as a matter of law, and summary judgment should be granted in that respect.

5. Intentional Infliction of Emotional Distress:

Defendants further allege that the claim of intentional infliction of emotional distress is groundless and that

the statements, if true, coupled with the actions of the officials, are not outrageous conduct which exceeds all bounds of decency and expected behavior. Without some evidence of outrageous conduct, this issue should not be submitted to the jury.

Plaintiff argues that the Defendants' "tangled web of deliberate falsehoods evidences their attempts to disguise their outrageous conduct in punishing the Plaintiff." Response at 15. As a result of this outrageous conduct, Plaintiff states that he has suffered depression, worry, anxiety, public humiliation, wounded pride, and mental pain and suffering.

Viewing the summary judgment evidence in its entirety, it is clear that the Defendants' conduct did not

amount to "outrageous conduct." As Judge Kazen pointed out in Soto v. City of Laredo, 764 F.Supp. 454 (S.D. Tex. 1991), this type of tort is difficult to establish because the Plaintiff must show that the Defendants' conduct was "extreme and outrageous," and that his own emotional distress was "severe." Soto at 457. This Court is of the opinion that summary judgment should be granted with regard to the intentional infliction of emotional distress claim against Defendants Brown and McCarley.

With regard to Defendant City of Kerrville, moreover, intentional infliction of emotional distress is barred by the specific exemption contained in the Texas Tort Claims Act. Section 101.057 of the Texas Civil Practices and Remedies Code provides that

the Act's limited waiver of immunity does not apply where the claim is one "arising out of assault, battery, false imprisonment, or any other intentional tort." Therefore, this Court is of the opinion that summary judgment will be granted with regard to the intentional infliction of emotional distress claim against the City as well.

6. Negligent Infliction of Emotional Distress:

Defendants, citing Fiorenza v. First City Bank, 710 F.Supp. 1104 (E.D. Tex. 1988), also argue that Texas does not recognize an independent tort for negligent infliction of emotional distress in the employment context as an exception to the "at will" employment doctrine. Plaintiff argues that recent case authority has implicitly overruled

Fiorenza.

In Fiorenza, Judge Cobb noted that "the Texas Supreme Court does not yet recognize a separate cause of action in the employee/employer relationship for negligent infliction of emotional distress." Contrary to the Plaintiff's assertions, this concept has not been implicitly overturned. As recently as March 10, 1992, the Fifth Circuit has reiterated this concept. Conaway v. Control Data Corp., 955 F.2d 358, 361 (5th Cir. 1992). Therefore, this Court is of the opinion that Defendants' motion should be granted with regard to the claim for negligent infliction of emotional distress.

7. Civil Conspiracy:

Defendants next assert that absent an agreement, there can be no civil

conspiracy. Additionally, they urge the Court to treat this cause of action in the same manner as the negligent infliction of emotional distress cause of action and hold that it provides no back door by which the employee can get around the employer's right to terminate an employee at will, even if the decision makers have communicated with each other concerning the conduct or performance of the employee.

In order to have a conspiracy cause of action, it is necessary for the Defendants to conspire to deprive the Plaintiff of his constitutional rights. Because this Court has already determined that Plaintiff failed to establish "speech" sufficient to implicate the First Amendment, this can provide no basis for civil conspiracy.

Additionally, this Court's determination that Plaintiff was not deprived of "liberty" in violation of the Fourteenth Amendment, precludes recovery under a civil conspiracy theory. Therefore, summary judgment should be granted with regard to the civil conspiracy issue.

8. Texas Common Law Wrongful Termination:

The Defendants next assert that under the "at will" employment doctrine in Texas, Plaintiff's wrongful termination claim is meritless. Defendants state that the exception established in Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985), does not apply in these circumstance. In that case, the Texas Supreme Court held that public policy requires a narrow exception to the employment-at-will doctrine for an

employee who was discharged for the sole reason that the employee refused to perform an illegal act. In such a case, the Court held that it is the employee's burden to prove by a preponderance of the evidence that his discharge was for no other reason than his refusal to perform an illegal act. Defendants argue that it is not illegal for a police organization to determine who will investigate violations of the law by members of the force, or to compel cooperation of its members with formal procedures.

Plaintiff points out that this doctrine was expanded in Johnston v. Del Mar Distributing Co., 776 S.W.2d 768 (Tex. App.--Corpus Christi 1989, writ denied), where the Corpus Christi Court of Appeals held that the Sabine Pilot exception also applies where an employee

has a good faith belief that his employer has ordered him to perform an act which may subject him to criminal penalties. Plaintiff argues that the he did have a good faith belief that the Defendants' demands that he "cooperate" in an investigation to "clear" the name of Barrow or surrender his badge left him with the choice of (1) risking criminal liability for participation in a cover-up of possible illegal activity by Barrow, or (2) being terminated or suspended by the Defendants. The Defendants argue that their demand that he "cooperate" with formal procedures did not amount to a cover-up. In fact, he was ordered to give a formal written statement of the allegations.

This Court is of the opinion no fact issues exist with regard to the wrongful

termination claim. The exception set forth in Johnson contemplates that the employee was terminated for his good faith belief in the illegality of his potential conduct. The summary judgment evidence in this case establishes that Plaintiff could not have had such a good faith belief in this case. Plaintiff was given the opportunity to make a written statement concerning his investigation, pursuant to the departmental rules. Plaintiff was given the option of resuming his employment with the department, as well as a formal name clearing hearing. Therefore, summary judgment should be denied with regard to the wrongful termination claim.

C. Motion for Summary Judgment -- Brown and McCarley:

In a second Motion for Summary

Judgment, Defendants Brown and McCarley move for summary judgment on the basis of qualified immunity, as set forth in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d. 396 (1982). In Harlow, the Supreme Court held:

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
>
> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether the law was clearly established at the time an action occurred. If the law at the time was not clearly established, an official could not

> reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful....If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.

Harlow at 818.

Because of this Court's determination that the Defendants did not violate Plaintiff's First Amendment right to free speech or Fourteenth Amendment liberty interest, Brown and McCarley were clearly shielded from liability for civil damages resulting from those activities. Moreover, because of this Court's determination that summary judgment should likewise be granted with regard to the pendent state law claims, this case should be dismissed.

D. Motion for Summary Judgment -- Barrow:

Barrow also filed a Motion for Summary Judgment in which he alleges that there is no genuine issue as to any material fact and he is entitled to judgment as a matter of law. Barrow incorporates the arguments made by the City, Brown, and McCarley in their Motion for Summary Judgment, as well as setting forth his own arguments.

This Court is of the opinion that the same reasoning adopted above applies to Barrow. Therefore, Barrow's Motion for Summary Judgment should be (1) granted with regard to the First Amendment issue; (2) granted with regard to the Article I, § 8, issue; (3) granted with regard to the liberty interest issue; (4) granted with regard to the

defamation issue; (5) granted with regard to the intentional infliction of emotional distress issue; (6) granted with regard to the negligent infliction of emotional distress issue; (7) granted with regard to the civil conspiracy issue; and (8) granted with regard to the common law wrongful termination claim.

V. Conclusion

Based upon the foregoing, it is clear that Defendants are entitled to summary judgment as a matter of law. Accordingly, it is

ORDERED that Defendant Louis A. Barrow's Motion to Dismiss and Supplemental Motion to Dismiss are **DENIED**. It is further

ORDERED that Defendants' (City of Kerrville, Glenn D. Brown, and Kirk McCarley) Motion for Summary Judgment is

GRANTED. It is further

ORDERED that Defendants' (Glenn D. Brown and Kirk McCarley) second Motion for Summary Judgment is **GRANTED.** It is further

ORDERED that Defendant Louis A. Barrow's Motion for Summary Judgment is **GRANTED.** It is further

ORDERED that this case is **DISMISSED.** It is further

ORDERED that any pending motions not previously ruled upon are **DENIED** as moot.

SIGNED this 30th day of November, 1992.

ss/
WALTER S. SMITH, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DAVID GILLUM	§	
	§	
V.	§	
	§	
THE CITY OF KERRVILLE,	§	
TEXAS, GLENN D. BROWN,	§	
in his official capacity	§	
as City Manager and in	§	
his individual capacity,	§	CIVIL ACTION
LOUIS A. BARROW, JR.	§	NO.
in his official capacity	§	SA-91-CA-0090
as Police Chief, and in	§	November 30,
his individual capacity,	§	1992
KIRK MCCARLEY, in his	§	
official capacity	§	
as Personnel Director,	§	
and in his individual	§	
capacity	§	

JUDGMENT

In accordance with its Order granting Defendants' Motions for Summary Judgment, the Court enters judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Defendant Louis A. Barrow's Motion to Dismiss and Supplemental Motion to

Dismiss are **DENIED.**

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' (City of Kerrville, Glenn D. Brown, and Kirk McCarley) Motion for Summary Judgment is **GRANTED.**

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' (Glenn D. Brown and Kirk McCarley) second Motion for Summary Judgment is **GRANTED.**

IT IS ORDERED, ADJUDGED AND DECREED that Defendant Louis A. Borrow's Motion for Summary Judgment is **GRANTED.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this case is **DISMISSED.**

SIGNED this 30th day of November, 1992.

ss/
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

(Transcribed from the tape recorded on August 2, 1990, by David Gillum. Subjects involved in the tapes:

1. Chief of Police, Louis Allwin Barrow, Jr. ("Allwin" or "Chief")
2. I.A.D. Officer Joe Lanning ("Joe")
3. Lieutenant Rosie McCray ("Rosie")
4. Personnel Director Kirk McCarley ("Kirk")
5. Officer David Gillum ("David")

Taped conversation after David was called in to I.A.D. office by Joe.)

David: "Joe"

Joe: "Yeah. I need to change my position around on this deal. I've talked to Debbie and I'm going to talk to Cheryl and I will be more than happy to let you read over any of their statements or go over anything.

Okay? But the reason I'm changing my position on this is I would like you to be assured yourself, you know that everything is on the up and up, and on the same hand and I looked over read the directives again. All internal investigations have to be handled through this office. Okay?

David: "Yeah."

Joe: "i.e. investigator."

David: "Okay."

Joe: "And this is now going to become an investigation."

David: "Even without having anything being written up because it has to be submitted and signed and all that kind of good stuff."

Joe: "The reason behind it is because this allegation is serious about the executive of this department and I don't..."

David: "Joe, are we talking about two different deals here?"

Joe: "No, I'm saying that there is a way to handle an investigation not by a patrolman."

David: "Okay."

Joe: "You brought this allegation you brought this information to your supervisor which was Rosie."

David: "Yeah."

Joe "I don't know what her recommendations were if she told you to come to this office or not."

David: "Okay. Go ahead."

Joe: "But you're now in this office and I know about this and I can't allow you to continue this investigation. You're not trained to do it. And these allegations are so serious that Debbie and I'm going to talk with Cheryl. I don't know who the original anonymous person is but I want to make sure that we are not dealing out of the guidelines by you being involved in an internal investigation and get yourself on a hook because I told you to go ahead and keep doing it. I can't do that. I can't tell you to keep on with the investigation."

David: "Okay. Uh."

Joe: "And I don't want it to stop because you're going to sit there and think that 'Yeah. Joe just wants me off this thing.'"

David: "Well, honestly that is precisely what I'm thinking."

Joe: "Well."

David: "I'm having...even if the guidelines were set up that you investigate any misdeeds by any personnel of the Kerrville Police Department. Aren't we overstepping one of the guidelines without a written...I came to you yesterday as a friend saying, 'Look, I don't know how to handle this. Am I doing it right?'"

Joe: "Well, you're not doing it right. That's the problem."

David: "Okay. I'm not doing it right by procedures or I'm not doing it right by..."

Joe: "Right. We are not doing it right by procedures because you're investigating an allegation and you don't have the authority to investigate that allegation."

David: "Do I have the authority to investigate an allegation of a citizen - somebody out here on the street. Somebody tells me that this..."

Joe: "This is not an allegation of a citizen on the street about some other person. This is no complaint as to other people. You're talking about members of this department."

David: "Right."

Joe: "And the only people to investigate members of this department is this division."

David: "Okay."

Joe: "Now what should have happened was the minute you told Rosie about this, she should have come to me or she should have sent you to me and her sit down in here and talk about this. What was her advice to you? What did she tell you to do? Or did she give you any advice?"

David: "Well, there was no...It's just kind of throw your hands up."

Joe: "If she's throwing her hands up..."

David: "Not, not, no not..."

Joe: "Did she tell you to come see me?"

David: "No. Matter of fact that was all my own idea and right now I wish I hadn't of."

Joe: "Well, now it's in my lap and I don't have any other choice. Because I can't allow you to keep going out here and investigating or something of this nature on another member of our department. You to a point and I'm aware of that and I may have violated it already by letting you do what you did yesterday."

David: "Well, if it's any consolation to you, I'm not going to write you up because of it. Joe, things have changed. Things

have changed in this department. People's attitudes have changed. I, I'm having a hard time understanding what you said yesterday about hearing complaints but everything seems to be on the rosy side. Evidently, we're not talking about the same people."

Joe: "We're talking about the same people."

David: "Because there's somebody lying somewhere."

Joe: "About what?"

David: "Uh...I don't know too many patrolmen - matter of fact, I don't of any whose had anything good to say about this administration."

Joe: "Okay. The same patrolmen come to me and I don't know if it's the same ones. But I've had a number of people in my discussions with them after this book came out saying 'Joe, there are a few people who are disgruntled and upset because the things that happened to them. I ain't going to beat around the bush. It's people from the task force that got changed over here and felt they were unfairly treated - felt that they should have their own rank given to the back which I don't agree to. I mean not their own rank but the rank they left with from the 216 task force that they should have kept the

same rank when they came back here. That's bullshit. They went over there to get their job. Nobody tested for those positions to get over to 216 task force. Nobody else had an opportunity to go to those positions and why they should still be considered investigators here at the P.D. This is just my own private opinion, okay. And I know that's why some of them are upset because they have lost their pay, they don't like the way they were turned away from 216 which had really more to do with the commander of 216 than it did with the commander here. Uh, but if you talk to the com-

mander over there, I'm sure he's going to load it all on this one here, okay. But those are the things that are coming back to me from the people I talked to. But, yes, morale is low. I'm not saying they're out there jumping around. They feel that there's a bunch of secrecy going around, you know, that they're not being informed - they're not being told things."

David: "Oh, yeah, we're being told things - that we're doing it wrong. Uh, in the past - I would say in the past week and a half, our paperwork has probably tripled. Now this is...

if I went to work in San Antonio, San Antonio Police Department right now, you know, they would train you so to speak in their paper work system, and, you know, guide you along. But we've been here an I've been here for what - three and half years. We've done it one way. It may have been wrong. I'm not saying it was right but we've done it this one way but now all of the sudden we've been bombarded by things that boggle...you, I mean, when are we going to get on the streets? It's writing, writing, writing..uh..and a lot of it is duplications. Seems like computers are far better

at duplicating than we are. So that's what a lot of the moaning and groaning is about that."

Joe: "And a lot of it has to do with that system because there - you write it up one way and you lose the ability to find it again. I'm not saying that's the only reason but if you don't generate the right kind of report for that system, it's very simple to lose it and not be able to find it the way you should if you do a arrest report. You should be able to look up the information and find the narratives and everything but if it refers back to a offense report that doesn't

exist, that wasn't generated, then okay. I'm just saying that's just part of it. Part of it is trying to keep what you're doing on paper in line with what they have to put into the computer. So they don't have to keep flipping pages back and forth - that the screen they see here is going to be the thing they are looking at there. Because the way it used to be - it was shit for them because some of the information would be here, some of it would be on the back, some of it would be up here. So it's a physical problem as well, okay. And then trying to mesh what they need in there

and fit what ya'll are going to be using out here to make sure all the questions that are being asked on here are being asked on here. So they came up with a form and they didn't like it. They came up with another form and yeah, it's a transition. And that's the whole reason for this four-page memo that came in the other day about the report that's hanging on the wall."

David: "Which is to be read every day for a week. I know, I've read it."

Joe: "Well, I know, I'm sure, I have to read it every time I did a report, you know, to make sure I did it right."

David: "Somebody has smoked in here."

Joe: "Yeah."

David: "Do you mind if I smoke in here?"

Joe: "No, go ahead. Uh...just flip that on."

David: "Okay."

Joe: "Right now the Chief's supervisor is aware of this and I'm going to need to talk with him again tomorrow because I know that there is going to be a bitter taste in your mouth about this, thinking that there has been half an investigation done by..unclear..is that your duty and responsibility is to bring this to the attention of your commander and your commander is to bring it to the

attention of Internal Affairs. Not for you to do the investigation, now if..."

David: "But the, I haven't formally put in writing uh presented you with anything."

Joe: "That's true, but I can't allow you to continue your investigation and I can't allow, after hearing this portion of the investigation, but to follow up on it. I know it's a catch 22.

David: <u>"No because somebody is going to benefit for it somebody is going to benefit."</u>

Joe: "Look, I'm going to tell you this. I don't give a shit right now whether you trust me or not, okay?"

David: "Okay."

Joe: "I'm going to have to do this the way I see fit whether you like it or not."

David: "Okay."

Joe: "Now, whether or not you trust me, that's incidental."

David: "Frankly, I don't, I don't not on this, not on this, I don't. I'm not going to lie to you. I'm not going to stand..."

Joe: "I don't know how to make you trust me. All I know now is that I'm going to have to do a full investigation, a written documented investigation, because I have to cover my ass when you tell someone else out here that I went in there and that's all a crock of shit."

David: "That I went in there and that's a crock of shit?"

Joe: "Yeah, that you went in there and you told me and they cover it up, because I perceive as that being the next step, I perceive that as being the next rumor. All I'm telling you right now is, is that you are no longer involved in this investigation, and I will talk with Rosie in the morning and tell her that as well and you are not to contact any more witnesses in regards to this investigation. Do you understand?"

David: "Oh, yeah I understand."

Joe: "Okay. I will be on the phone in just a minute and discuss

this with your Lieutenant and you will cooperate with this investigation to its fullness, which means that I have to take a statement from you..."

David: "No, Chuck..uh..I mean Joe, we will get an attorney, that...I just ended this discussion."

Joe: "You're going to have a seat right now and we are going to get your Lieutenant and we are going to discuss this...you don't have to say another word for right now."

David: "Let me take care of this. I'll be in the office."

Joe: "All right."

August 2, 1990

(Taped conversation of meeting between Joe, Rosie and David. This meeting immediately followed the meeting between Joe and David.)

Joe: "Hi."

Rosie: "Hi."

Joe: "Have a seat...close the door... What is happening is David came into my office yesterday and advised me, wanted to know if I would be able to handle a complaint against the Chief...in regards to allegations that he was involved in some type kind of pot party. I don't...if it was just a party or just involved with someone smoking pot. Uh...since then, I've talked with the...uh,

Personnel Director, talked to Kirk and explained to him, what was the known...uh, because it is (unclear) problem, which is going to require an internal investigation. I've told him that he is not to contact any of the witnesses involved in this mess, that I'm going to document, that if he wishes, uh..that I don't have a problem with him reading the documentation. I've also explained to him, that he is to cooperate fully with this investigation, at which point..uh..he said, 'No, I want to talk with my attorney' and that's the crust of where we're at. Uh..because this is a civil situation, not

a criminal situation, you are not entitled to an attorney and if you refuse to answer questions regarding to an investigation. That is grounds for charges of insubordination...do you understand that?"

David: "Yes sir, I do."

Joe: "Okay."

David: "and I refuse."

Joe: "to answer any of my questions."

David: "From here on yes...from while ago before you called the Lieutenant."

Joe: "Okay...those questions would be in regards to when you became aware of this complaint, what you did, and (word unclear) to the complaint...and

you're telling me now that you're going to refuse to answer any of those questions?"

David: "Yes sir."

Joe: "Okay...uh."

David: "Other people got a little integrity too."

Joe: "This has nothing to do with integrity."

David: "Okay."

Joe: "You understand that you are not to contact any of the witnesses in this case?"

David: "I understand. I told you I understood a while ago."

Joe: "Okay...and that you are not to conduct any further investigation into this on your own."

David: "I understand."

Joe: "Okay...right now that's all that's going to be done. I don't plan to..uh..question you any further, until 8:00 tomorrow morning.

David: "Am I going to get paid for being in here?"

Joe: "You're not suspended...I mean I don't see why. Uh..what time do you come on duty - 5:00?"

David: "No, I'm off tomorrow."

Joe: "Okay...you're on duty tonight until when?"

David: "3:00 AM"

Joe: "Who else is on shift?"

Rosie: "Roesler, Judd, Harst, up until 9:00 then you have (word unclear). I don't know exactly who all's on then...you should

have about three more come on then and Harst will go home."

Joe: "Okay...David, I'd like to talk with your Lieutenant in private."

David: "Go ahead."

Rosie: "David."

David: "Yes, ma'am."

Rosie: "You can go back on the streets."

David: "Yes, ma'am."

August 2, 1990

(Taped conversation of meeting between Joe, Rosie, David, Kirk and Chief Allwin Barrow. David was called in from patrol for this meeting approximately 30 minutes after the meeting between Joe, Rosie and David.)

David: "Hello, Kirk."

Kirk: "How're you doing?"

David: "Pretty good."

Kirk: "Good."

Allwin: "Have a seat."

David: "I assume you want it closed."

Allwin: "You want to let me know what's going on?"

David: "Uh...I'd rather not, because it does involve you and somehow and don't know how I managed to do it, but got crossways with Joe and uh...by terminating any

type in interview...uh, rather not discuss it anymore."

Allwin: "You wouldn't."

David: "I wouldn't...rather discuss it anymore."

Allwin: "Okay."

Kirk: "Can we assume then that the issue is dead?"

David: "No sir."

Kirk: "Then if you're not going to discuss it anymore..."

David: "I've been told what I can do and what I can't."

Kirk: "Yeah."

David: "And..."

Allwin: "Who by?"

David: "Joe."

Allwin: "Okay."

David: "And...I am going to abide by it. The question come up

whether he said something about me not wanting to cooperate anymore and I think due to the circumstances he's probably right. I don't think that this ought to be public knowledge. I don't think it ought to be handled in the manner that it's going to be handled."

Allwin: "What do you mean by that?"

David: "Sir...I just as soon not go into it any further...please. Joe has made whatever...I mean he's got y'all down here for whatever reason and I'll go with that."

Allwin: "Well, I assume that there is an allegation against me for misconduct. Is that correct?"

David: "Right."

Allwin: "Okay and I also assume that you have gone to your Lieutenant. Is that correct?"

David: "Okay."

Allwin: "Yes or no?"

David: "Yeah, I have."

Allwin: "Okay and can I ask what steps you've taken since?"

David: "Uh...no sir, please."

Allwin: "I'm not asking. I'm demanding answers."

David: "And then I'm not going to give one."

Allwin: "David, this is...let me give you some advise, okay? I know what the allegations are."

David: "I know you know."

Allwin: "And I'm no fool."

David: "Uh...okay."

Allwin: "The reason that Mr. McCauley is here is to see to it...that the investigation is handled properly."

David: "Okay."

Allwin: "We need to get it squared away so we can stop all this crap, all this innuendo, and all this other stuff. If it's not innuendo then we'll prove that it's not innuendo...okay?

David: "Well."

Allwin: "If I'm guilty of misconduct, Mr. McCarley is here to see to it that something takes place."

David: "Okay, this not going to be accomplished tonight though."

Allwin: "We need to get started tonight."

David: "Uh..evidently...inadvertently, I started it."

Allwin: "Yes, you have...so we need to go ahead and get it taken care of (unclear)."

David: "I went to Joe for advise, not...<u>not to accuse you of anything, but there were some allegations that have been made...uh...I've been made aware of it</u>. Uh..."

Allwin: "Who made the allegation?"

David: "Well, uh..."

Allwin: "You understand that..."

David: "You know..it, <u>you know as much as the allegation then you know all the names involved except for one of which I can't and won't indulge</u>. Uh..but she did

not accuse you of anything so her's is immaterial anyway.

Allwin: "Okay...so somebody has actually made an allegation."

David: "..uh..to me they have..yes."

Allwin: "Okay."

David: "To me they have and publicly."

Allwin: "Publicly where?"

David: "In a bar."

Allwin: "In a bar?"

David: "Yes."

Allwin: "Okay."

Kirk: "One of the allegations, David, I'm familiar with..it stems to some that we discussed before ..before we hired the Chief. That.."

David: "No, no, no, this is something new. It has nothing to do with prior to hiring..."

Kirk: "One of them does, uh..having to do with his time in Beaumont."

David: "Okay. Well, Joe cleared..I mean there was rumors running around that..uh..the Chief had been caught dirty there..uh..and somehow managed to escape. Uh..that rumors. You know, yesterday..."

Kirk: "You are aware that that's erroneous."

David: "Right."

Kirk: "and.."

David: "as of yesterday.."

Kirk: "And I hope you are doing your part to insure these people that are making these allegations to assure them those are false rumors.

David: "I can't say that I've talked to anybody about it since yesterday when I found out from Joe that..there was a lot Joe told me that I didn't even know, period. Uh..nobody else knew."

Kirk: "That information was in the newspaper before he was hired."

David: "Well..uh..with our bout with the newspaper, I don't read it. I didn't know any about it. It just I know the rumors are there. Uh..there is a lot of mistrust in this department. When I say there's a lot of mistrust in this department, I'm looked at as who the hell has he been talking to because everybody..in the upper echelon

can't seem..to see it..I mean don't know if we're talking to two different group of people or you know it's maybe people here I don't know about. Uh..but I'm here to say that there is a morale problem and it has a lot to do with you, Chief."

Kirk: "Well, is it a morale problem or is it mistrust?"

David: "A lot of it's mistrust, mistrust because..My personal opinion is that I'm getting sick and tired of hearing about Beaumont. How Beaumont does it Beaumont does it this way. That the reason we're doing this way, because Beaumont done that way and we're this way for

20 years or more. Maybe the Beaumont way is better. I don't know but I..that is the general attitude, if there is something new that came down the pike, it's because that's the way they did it in Beaumont. And instead you coming in and trying to blend with as you are wanting us to blend with you.

Kirk: "Let me say something on that. Before we hired him, we had a different administration."

David: "Right."

Kirk: "And the morale?"

David: "Real bad."

Kirk: "And that's one of the reasons that we got some of the Police Department people involved in

the committee to pick a new Chief. And one was a Patrol Officer and all we can do is go by what we're hearing from these individuals. The thing we heard or that we want change. Something has got to happen down there. All we can do is to assume that's the voice of the Department speaking. We heard it in chit-chat session. You got problems with the leadership."

David: "I called you and talked to you."

Kirk: "You talked to me..uh..not so much about the Chief, but about one of the Sergeants."

David: "Okay."

Kirk: "Uh..you may not think we responded, but the thing that people got to understand (word unclear) if not going too good and if not going to be all hunky doree but I think you're going to see..if you stick with it for professionalism in the Department..And..uh..I think we are talking poor morale, while people are uncomfortable with the change and confusing it with mistrust and don't want confuse..I can understand poor morale and we can deal with that (unclear) but don't let anybody drag this Department down because morale is bad and blame it on mistrust. There's nothing there to substantiate

any mistrust. At least nothing to satisfactorily appeal to, you know, the things we've heard as far as the reasons for mistrust, there's no foundation in it. People are talking, people say this, people say that, but people are going to say anything."

David: "Yes sir, they will but..."

Kirk: "And, it's the job of people who wear blue you know, to stand behind their administration. When we've checked the whole facts out; there's nothing there, not a thing."

David: "Not a thing where?"

Kirk: "In this individual's background."

David: "Okay."

Kirk: "To..to..prompt anyone's mistrust. And we did one of the most thorough background investigations we've done on anybody. We did it on him. There are no ghosts in the close. There, there are no gremlins in the present situation. I think what you are perceiving is a different styled of management, versus the old style, and you got to change..a change that was wanted, but you can't have your cake and eat it, too. With change there's gonna come..; there's gonna come some pain and there's gonna come some uncomfortable situations for some people. And be it right or wrong, you work for a

person, you work for them, for God's sake. And you gotta work together, you gotta support it. The morale is just gonna sink lower and lower and lower as long as those things continue to..."

David: "Okay, this won't like I said, supposed to be public knowledge, I'm not talking about anything in the past. Joe explained yesterday and cleared that up, anything about the past. We're talking about the allegations that are made now. Since the Chief becoming Chief in Kerrville. Not..not.. nothing in Beaumont. I don't think, already I don't think, that it..that it in any way it

could be fair, now. We deal with, uh, criminals everyday ..we..we..we don't sit in an office to discuss it with them. I'm not calling the Chief a criminal; I don't know. I'm saying the allegation is there, I was checking it out, I was told not to..period! That somebody else would check it out."

Kirk: "That..that's procedure. That's protocol."

David: "Uh, okay. Uh, under..alright."

Kirk: "You, you gotta have procedures, I mean.."

David: "That's fine, that's fine."

Kirk: "And this is the..the man that you need to go to when you have a complaint. And that's how..

how a complaint is lodged. And it's up to him to investigate."

David: "I went..I went to Joe for advice, not a complaint. I went to Joe to find out whether Joe could handle it or not. Not as a complaint! I didn't have all my stuff together to take it to Joe to even complain. But, now I'm told I can't do nothing about it."

Chief: "That's not true! You can give your information to Lt. McCray and to Sgt. Lanning and let them do the investigation. That's what you are being told you can do. You want me to leave, I'll leave, David. 'Cause I want this shit stopped! Now, either you cooperate

with these people, or you don't."

David: "Well, under the circumstances, I just don't see how I can, Chief."

Chief: "And what are the circumstances, David? Are you gonna go out there and do an investigation on your own?"

David: "Umm..okay, let's don't get me, let's get somebody else. You appointed Joe to this position. Now how biased is he gonna be?"

Joe: "If you remember correctly, David, that position was posted, and people applied for it. And we were interviewed.. you make it sound like this was Moscow or something."

David: "Well?"

Joe: "Is that not correct? This is the place for this."

David: "I'm..I'm not gonna say it was, because I don't remember but I'm not gonna say it was but for sake of argument, I'm gonna say it was. Uh, but I also know that, uh, oh, for the lack of a better work, you were a shoo-in for it. Uh, that was once again, rumors prior to you getting the position..that you were going to get the position."

Kirk: "So what? I mean, there's a reason for it, probably. I mean this guy's had tremendous performance evaluations all through a period of years, he's

proven himself in the Department."

Joe: "Not more than an hour ago, you told me yourself there was no one else more trusted in this position."

David: "Uh, I told you that if when it come to me, if I was going to be investigated..uh.."

Joe: "If there was a rumor that if someone was going to be investigated and they were guilty, that if Joe did it, he's gonna find out and that.."

David: "No, no, no, no..Joe, I said me, I didn't say everybody else; cause I don't know about everybody else."

Joe: "Well, in your mind, then..I was (not understandable).."

David: "On me! On me!"

Joe: "On you!"

David: "Uh, I'm not..and I, and I told you before right after that, that I don't think I could trust you to investigate the Chief. But, yes, I think I could trust you to investigate me."

Rosie: "Well, let me add a little something, David. Joe is on this position. Joe knows when he gets a complaint, he has to handle it."

David: "Uh-huh."

Rosie: "And regardless of who he's investigating, he has to be fair, or else he's in trouble. If it comes out down the line that he covered up something,

well then he's in it, too! I feel that Joe would be fair about anything, even with the Chief. Even though everybody's saying they're good friends, I think Joe would be fair. And once you have put this complaint in here, Joe has to check it out. Anything he come up with, and you're not satisfied with, you can appeal it. There's always someone higher you can go to."

David: "Joe, yesterday when I came to you, was it with a complaint?"

Joe: "It was with advice and with the notion that you were going to start digging into something to gather these facts to bring them for me to investigate."

David: "For you to investigate..I didn't come there with a formal complaint. I know who the girl is, I know her reputation, I know that she's been arrested umpteen times for it. I did talk to here last night. She denied everything, I've told you that today..she denied everything, other than the party itself..or gathering. But no dope was involved. She mentioned another person, I was gonna go talk to her. If, in fact, she denied the same thing, then what else am I gonna go, where else am I gonna go? I'm gonna have to come to you and say Joe, I

found this and this and that and it's..that's it, I can't ..there's nothing there."

Joe: "The problem here, David, though, is that you are not the person to investigate internal problems. That is for my division, and you were told that, under those circumstances, and you have been to cooperate with this investigation to it's fullest, which you have refused to do."

David: "Correct."

Joe: "And that's where we've at now.

David: "Correct. That's how I stand, right there."

Joe: "You're saying that you're refusing to cooperate with any questions that I might ask you

with regards to this investigation.

David: "Any further, yes."

Chief: "David, do you know what this leaves us to do?"

David: "Uh-huh."

Chief: "How long did you try and get on this department, David?"

David: "A long time. And, I told Rosie McCray when I got hired here, if I did anything to embarrass this department I'd leave on my own."

Chief: "Is that what you're suggesting?"

David: "I don't think I've embarrassed it yet. (not understandable)"

Chief: "...damage, is it going to be awful difficult to repair?"

David: "No, sir! I didn't create anything. I didn't make the allegations. I was told about them."

Chief: "Why don't you wanna go help.. let's either clear them up or not. Let's do something with them."

David: "Because, frankly sir, I don't think they will be cleared up now. I mean I..there's nothing that can happen right now that would satisfy me..my mind.. and I realize that's it's just mine, uh, that would make me say, yeah, Allwin Barrows does not smoke grass. There's nothing that ..that there's nothing that could happen now."

Kirk: "Then what you're..then what you're saying is basically you cannot at this point, and probably never under the circumstances, work with trust in the administration here."

David: "Uh, not with uh..not the way it's been handled so far, no."

Kirk: "Which is the internal procedure which is outlined in the police procedure manual."

David: "Okay."

Kirk: "Therefore, can you work here?"

David: "I've worked here for the last 30 minutes and did my job and nobody's complained."

Kirk: "Can you continue to work here?"

David: "I don't see why I couldn't."

Kirk: "Even though you don't trust the people you work for?"

David: "Uh, there's a cliche that most cops use.."C.Y.A."..I will dot every dot..cross every t."

Kirk: "But what if you create a irreparable impact on the department, due to the fact that this thing lingers in your mind and you can't work here with trust in the people you work with. That doesn't make sense to you, does it?"

David: "Well, Kirk it makes sense to me that if you're going to investigate a person..to have it come out like this in a group meeting."

Kirk: "But you know what you're saying to me tonight is basi-

cally, you know, that you want free rein to go after anybody you want to go after, and that you would come to me and say you want me to fire Glenn Brown. That's not my job, it's the City Council's job."

David: "I didn't go to Joe and ask him to fire the Chief, either. Uh..I don't understand the parable there."

Kirk: "I don't understand..I don't understand your parable because this is..this is just a procedure. I mean procedures are outlined in every organization. Unfortunately, it doesn't work from the bottom up, it works from the top down."

David: "Well.."

Kirk: "You have a procedure, whereby if you have a problem, to go through, you just tell your commanding off..your lieutenant, who then refers your internal affairs person to investigate. And if there's ever, if there's any finding of the problem, then so be it, but I think he told you yesterday, you know, there's not truth to these allegations."

David: "Well, we're not on the allegations of anything in the past, how can he say there's no truth to the allegations that have happened now when he hasn't investigated it. The now is what we're after."

Kirk: "What kind of investigation is required on things that, you know, have no, you know, have no truth."

Rosie: "How can he investigate, David, when you won't given him anything to investigate? He doesn't know what you know."

David: "He knows everything I know."

Rosie: "So how can he go and contact these people that you were going to contact unless you tell him? And once you've put an allegation down and tell him that you want to try to find out about it, how can he do it if you don't cooperate? You're gonna have to trust this man right here. And he can't jeopardize himself by covering up

something. That's the way I feel about it."

David: "Joe knows everything that I know."

Joe: "Unfortunately, I don't."

David: "Unfortunately, you do."

Joe: "I don't know when this occurred, I don't know when you learned it, I don't know (not understandable) what we're going to get into, and we're going to document this whole thing. If you refuse to do it, where are we at?"

David: "Well, I still don't think that (not understandable)..I'm afraid I'm gonna disagree with you, I just don't think you can be impartial at this point. And I think that any further

discussion about it is a waste of everybodies time that's off duty at the moment."

Rosie: "Well, David where do you think that that leaves you?"

David: "I..I realize where it leaves me."

Chief: "What is that?"

David: "You're either gonna say you're suspended until you come up with an investigate..err ..cooperate or you're fired all together. I don't know which it will be, uh.."

Kirk: "It sounds like to me that's what you want him to do."

David: "No, not at all, I want to get back on the street. The city doesn't pay me much, but they

pay me to be out there, not in here."

Rosie: "But David, this is a serious charge."

David: "Yes, it's extremely serious, and that's the reason.."

Rosie: "Once you've made that allegation, you can't just cut it off."

David: "I didn't make an allegation, I went to Joe for advice. Now I see that that was wrong."

Rosie: "What position does Joe have? You think he can just pass it off? He can't just overlook that. You have made a serious allegation about the Chief of Police."

David: "No, ma'am! I haven't made an allegation. Somebody else did."

Rosie: "Well, you relayed to the..to him."

David: "For advice."

Rosie: "I mean, don't you want to clear it up?"

David: "Oh, yeah, yeah."

Rosie: "Well, why can't you cooperate with him?"

Kirk: "From where I sit, David, it sounds like you want to quit your job, and you want to continue this investigation on your own. That's not going to work. Either you let this thing just drop right now and we never hear a thing about it again, any rumors, allegations, anything having to do with him or anybody else in this department, and let the (unclear)

charge be brought to internal affairs, which is your procedure, free and clear. And that's all there is, you have two choices here. We're not gonna force you out."

David: "Well, I'm not quitting."

Kirk: "Well, we're not gonna allow insubordinate (unclear) this department, either. You don't bite the hand that feeds you."

David: "Last word is I'm not quitting. You'll do what you think you have to."

Kirk: "So what you're saying is you're going to continue..we're going to continue to hear about this."

David: "Not from me, you won't. I've been told I can't do anything with it."

Kirk: "But you're going to continue to..to talk about it with people (not clear)."

Chief: "Let me..let me..let me clear something up. An investigation is going to take place."

David: "Okay."

Chief: "Now you can cooperate, or you don't. Because at this point, I'm going to see that an investigation takes place to clear my name. Because there's four people in this room have heard that, plus any number of other people out on the street that you have gone for and sought for advice, and I'm gonna clear

my name, Dave. Whether you cooperate or not. Now I've listened to you argue with Mr. McCarley and I've listened to you argue with her, and it's coming down to either you're gonna cooperate right this minute, or you're gonna give me that badge. And you can talk to them for a few minutes, cause I'm gonna go step out of this room and you decide." (sound of door opening or closing)

David: "I won't compromise this badge."

Transcribed from the tape recorded on August 6, 1990, by David Gillum during the meeting with Kirk McCarley ("Kirt")

David: "This may or may not be an ____, I don't know. (nervous chuckle) Am I fired?"

Kirt: "No."

David: "I didn't quit."

Kirt: "You took your badge off when given the chose of.."

David: "But given a chose of what though?"

Kirt: "Given the chose of letting this thing drop or resigning and your exact words were 'I will not let my integrity be compromised and my values' or something like that."

David: "Yeah, something similar to that, yeah."

Kirt: "Then you took your badge off, took your gun off, your holster and laid it down and later turned in your things to the Chief."

David: "_____ was ordered to do that, too. Prior to all of that, I said I wasn't quitting."

Kirt: "You did say that you weren't quitting and you also said that you weren't going to let the thing drop and let the thing go through the proper channel."

David: "Do you know what the proper channels are by any chance?"

Kirt: "____ Internal Affairs."

David: "With a complaint. Nobody had made a complaint to Internal Affairs."

Kirt: "Then the action should drop now at that point."

David: "Noooo, if there is a uuuh..if it went through Internal Affairs, it should drop, yeah, but if I am investigating a citizen or if I am investigating you or somebody else, just because somebody says lets make it drop. I can't do that. I have an oath to uphold."

Kirt: "I understand that, but this is a member of the department.."

David: "That's right."

Kirt: "your investigating and in that particular incidence there is an Internal Affairs procedure that needs to be followed."

David: "That's right, if there is a complaint to be made to Inter-

nal Affairs, but there hadn't been. I went to Joe for advice, not for a complaint. I wanted to, if in fact the Chief is guilty, if in fact the Chief is innocent, I wanted to make sure that I was doing the right procedures in my investigation. When I had the whatever evidence or lack of evidence considering Joe knew about it, I would have given it to him. Then he could have taken off with the investigation and done whatever Internal Affairs do with it."

Kirt: "You should have come up to Joe and said like I have heard these rumors and I would like a formal investigation to be done

on this particular case and that is the proper channels."

David: "Well, that's not what is in the handbook. And that is not what is in our code. uh..or.. rules and regulations. I have never signed any forms saying that I am making an official complaint against the Chief. I have never had anything notarized."

Kirt: "Why did you take your badge off and that sort of thing?"

David: "Because the comment was made that..first of all the comment was made I had to drop it all together, and I can't do that. Then another comment was made that I would cooperate in clearing the Chief's name and I

can't do that either. I can cooperate in an investigation, but I can't cooperate in 'clearing' somebody."

Kirt: "But that is not your job."

David: "It is..I think I know what.."

Kirt: "That's not your job, I mean to do that we have a particular procedure. In this particular case, it is like you suspect somebody of a felony, you know, you would take that to the proper persons to do something like that."

David: "When it goes into a report form, we do. Then that is exactly the way it is handled. A patrolman is the initial contact on most everything, not everything because the CID gets

involved in their own investigations and stuff without us. What we have done in preliminary investigation, yes it does, then it goes in report, it goes into Lt. Rosie McCray and then it gets shipped up to CID for the investigation. I understand that procedure. The procedure that I was doing, is no more than that. It was still in an investigative type deal, uh..no report had been made up, I hadn't officially come to Joe with anything. Like I did officially go to Rosie with reports...in the line of duty."

Kirt: "You know why we ____ have a singular body there that is in

charge of handling these things that are very sensitive. The things which are being discussed concerned the Police Chief, by God."

David: "Great!"

Kirt: "And keeping him from being immune..can you imagine the morale and irreparable damage that it would do to a department when you're saying that the Chief of Police may be guilty of all these things? That's why when you put it in the hands of one person to make sure the whole department isn't pulled into this."

David: "Well, the whole department wasn't into it until Thursday and then, as a result of mis-

management on Joe's part, everybody got into it. I know that, in fact,..that the Chief was at the party. I've got that much. The day before Thursday, on Wednesday, when I went to Joe and told him what I had or what I had heard and what I was going to do, he was in agreement with it. The next day on Thursday, he called me into the office. He called me, now everything has changed. Kirt, if I was to investigate you, you are going to know about it eventually, but before you can get rid of any evidence, I am going to investigate you and you're not going

to know about it. That is standard and.."

Kirt: "That is the way it should be."

David: "____ should have never known about it, at this point."

Kirt: "But there was no complaint. I mean these..."

David: "It was to me."

Kirt: "Then why didn't you follow the complaint?"

David: "Because I am going to find out before I file a complaint. I'm not going to say, Kirt, you were doing something like sky-diving without a parachute, I'm going to investigate first and okay, I've found out this and this and this..yeah, now comes the complaint. You have to have probable cause."

Kirt: "When you talking about a security officer, you rule out the implications of ..that's why you put it in the hands of this neutral body which is the IAD and I know you have some problems with that, but that is procedure."

David: "Well, I don't believe Joe is a neutral body at this point."

Kirt: "That is the procedure!"

David: (inaudible)

Kirt: "And you know why. If you are on your own doing this. Think of what position that leaves you in, as far as your relationship with your superiors. That is why we have that there. Do you think since he knows you were doing this, that he will

ever be able to treat you in the same manner? No, there is no way. That is why."

David: "I should hope not, Kirt. Because the man has threatened me three times."

Kirt: "How has he threatened you?"

David: "For one, somebody had told him one story that was completely false and we had a meeting out in the back parking lot and with his finger in my face, I was told never to threaten him, I should never threaten him! One time, right there in his house that he lives at now in the back driveway, I had heard rumors that B. Satchel (sp) and myself were trying to get his job. This is what I heard. I

was talking to the Chief about another matter and said, by the way, if in fact you have heard these rumors, they are false. I know of no plans to get rid of you. I have never heard of anything like that, but I did hear this rumor. He got in my face.. Can you hear outside this office?"

Kirt: "No."

David: "Okay, he got in my face and said no three year slick ____ motherfucker is going to take my job. Kirt, did I say that I was trying to take his job? I was trying to dispel a rumor that was completely erroneous. It is garbage. I don't care how you look at it, it's

garbage. I don't care how bad or good of an investigation that you did. That's garbage."

Kirt: "David, I don't want to get into that because I wasn't there."

David: "Well, I realize you wasn't, but I was. When I was told to cooperate and clear his name or put my badge on the table, I had to put my badge on the table. The badge and the gun go together. I am not going to walk out of that building with a gun and no badge. That's almost suicide. I left going to my car to get my stuff out of it to put in the patrol room and that particular point, Joe Lanning caught up with me and

demanded my uniform right then. The gunbelt and my I.D. I somewhat pleaded with him for the uniform but I did give up the gunbelt. I was told to turn it in the next day which was Friday. I called Rosie and said, look I'm not sure of what the deal is here because I didn't quit."

Kirt: "What did you do then?"

David: "I did what I told to do."

Kirt: "You had two choices."

David: "But neither one of them meant termination."

Kirt: "Either just let the thing drop or you could have a formal complaint procedure you could go through and you weren't comfortable with your department pro-

cedure and I can't deal..I mean we can't change that, that is your procedure. We can't implement a new procedure every time we have somebody who doesn't like the old one. I mean.."

David: "Nobody said I didn't like the old one...y'all, as far as I see,..strictly me seeing A B C, y'all are admitting B, but want me to go straight to C which is Internal Affairs. Well, never mind, my question is am I employed by the Kerrville Police Department?"

Kirt: (phone rings) "Excuse me. This is Kirt. Not at the present. Your welcome, goodbye. (SPEAKING TO DAVID) No."

David: "Well, Ookay...I suppose I'll have to wait until the regular payday to get paid or..."

Kirt: "Well, what we will have to do is calculate all of the time and that sort of thing."

David: "I've got vacation time and comp time coming."

Kirt: "Yeah, yeah, uh..it'll have to be on the regular payday. It is the way our computer system is set up here."

David: "Alright then."

Kirt: "Sorry, David."

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DAVID GILLUM	§	
	§	
V.	§	
	§	
THE CITY OF KERRVILLE, TEXAS, GLENN D. BROWN, in his official capacity as City Manager and in his individual capacity, LOUIS A. BARROW, JR. in his official capacity as Police Chief, and in his individual capacity, KIRK MCCARLEY, in his official capacity as Personnel Director, and in his individual capacity	§	CIVIL ACTION NO. SA-91-CA-0090

AFFIDAVIT OF DAVID GILLUM IN SUPPORT OF PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

THE STATE OF TEXAS §

COUNTY OF KENDALL §

Before me, the undersigned authority, personally appeared DAVID GILLUM, who, after being by me first duly

sworn, stated upon his oath as follows:

1. "My name is DAVID GILLUM. I am over the age of eighteen (18) years and competent to make this Affidavit. I am not disqualified by law from making this Affidavit. I know the facts stated in this Affidavit to be true and correct of my own personal knowledge.

2. I was formerly employed by The City of Kerrville, Texas ("Kerrville") for approximately three (3) years as a patrolman in the Kerrville Police Department. I was terminated from employment on August 2, 1990 at a meeting at the Kerrville Police Department attended by Allwin Barrow, Jr., the Chief of Police, Kirk McCarley, the Personnel Director of Kerrville, Joe Lanning, Chief of the Internal Affairs Division of the Kerrville Police Department, and Lt.

Rosie McCray, my supervisor. During the meeting, I was asked to cooperate in an investigation of Chief Barrow. I had previously informed Sgt. Lanning of all the information I had obtained prior to such time concerning the investigation of allegations of misconduct by Chief Barrow. When I was asked questions concerning my cooperation and asked to provide all information I had obtained in the investigation, Chief Barrow was present. I was concerned and expressed my concern that it was inappropriate for the target of an investigation to be present when I was being requested to divulge information concerning the investigation. I was further concerned that prior allegations of misconduct against Chief Barrow had apparently not been investigated. Sgt. Lanning and

Chief Barrow were friends and I questioned in my mind how vigorously Sgt. Lanning would investigate these allegations. I felt that my divulging information at such time to the target of the investigation would compromise the investigation. I believed other witnesses should have first been interviewed, or other evidence secured, prior to confronting the target of the investigation. I further believed that any participation by me in such actions might be illegal. I finally was concerned that I was being accused of not following correct procedure after I had first expressly sought advice and guidance from my supervisor and Sgt. Lanning concerning the investigation. I certainly made no effort to hide my involvement in the investigation or

refuse to disclose any information I had obtained. Chief Barrow at one point in the meeting, in an angry voice, stated that I was either going to cooperate in an investigation to clear his name, or I was going to give him my badge. I believed I had no choice, but to give him my badge, as I felt the other action requested would make me a participant in what could be a cover-up of allegations of misconduct against Chief Barrow. Prior to such request by Chief Barrow, I twice informed those present that I was not quitting. After placing my revolver and badge on the table in front of those present, I left the room. I left my revolver because of my understanding that I cannot carry a weapon without a badge. Immediately upon leaving the room, I informed the dispatcher, Larry Rhodes,

that I did not know what was happening, but I did not quit. Sgt. Lanning left the room and rushed out after me at that point and demanded that I turn in all of the property issued me by the Kerrville Police Department. After inquiring whether I should at that location remove my uniform, he stated I could turn it in the following day. I believed that my action in turning in my badge and leaving room might subject me to suspension, but was later informed by Chief Barrow and Mr. McCarley that I had resigned. I did not resign and have never tendered any letter or other writing to Kerrville stating that I was resigning my position as a patrolman in the Kerrville Police Department.

3. On August 1, 1990, I asked Sgt Lanning about the correct procedure to

undertake an investigation of allegations of misconduct against the Chief of Police, because I had never before sought to investigate a fellow officer and because of requirements of a procedural order of Chief Barrow (a true copy of Procedural Order No. 90-06 is attached hereof as Exhibit "I" and made a part hereof for all purposes) governing internal affairs investigations. I went to Sgt. Lanning because I had received information from a confidential informant, that I had found reliable in the past, that a woman with a criminal record was bragging that she had been "smoking dope" with Chief Barrow. Not only would this have involved criminal conduct by the Chief of Police, but this would be a violation of the rules of conduct of the Kerrville Police

Department at such time. I earlier had reported these allegations to Lt. McCray, my supervisor. Sgt. Lanning authorized me to interview this woman and did not require me to first file a written complaint. He also informed me the investigation would be kept confidential and no one else would know of the investigation. The Employee Handbook of Kerrville (the "Handbook") requires this confidentiality. A true copy of the pertinent provisions of the Handbook, in effect at such time, is attached hereto as "Exhibit "K" and made a part hereof for all purposes. I felt it would have been premature to file a written complaint prior to this interview. After my interview of this woman, I reported the information I obtained to Sgt. Lanning on the afternoon of August 2,

1990, including the information that there was another witness suggested by the woman that I should interview. This also included the information the woman indicated she was personally acquainted with Chief Barrow and stated she and a friend had partied and drunk a few beers on one (1) occasion with Chief Barrow and friend of his from Beaumont. She also mentioned she and Chief Barrow had discussed the details of her most recent arrest and he had criticized the way her arrest was handled by the drug enforcement task force. I finally informed Sgt. Lanning I had tape recorded this interview. I later gave him a copy of this recording when he requested me to do so at a hearing before Mr. McCarley on September 12, 1990. I also requested to interview the second witness and Sgt.

Lanning agreed I should do so. Again, he did not request that I complete a written complaint. This second meeting with Sgt. Lanning occurred later on the afternoon of August 2, 1990. Shortly after leaving this meeting with Sgt. Lanning and going back out on patrol, I was contacted by the dispatcher and asked to return to the police station. I went to Sgt. Lanning's office and he informed me that I was being removed from the investigation, because I was not following the correct procedure. This is not true. Prior to such time every action taken by me had been at his guidance and with his consent. He informed me that I was not to continue my investigation and I informed him that I understood his instructions. I did not continue the investigation and never interviewed the

second witness. Sgt. Lanning indicated he had interviewed this witness. I did express to Sgt. Lanning my doubts that the investigation would continue because I had heard reports of prior wrongdoing on the part of Chief Barrow that apparently had not been investigated by Sgt. Lanning. Sgt. Lanning was appointed Chief of the Internal Affairs Division by Chief Barrow and was known to be a friend of Chief Barrow. Sgt. Lanning was angry when I left. Soon after, Lt. McCray ordered me back out on patrol. Within a short period of time, however, I was again contacted by the dispatcher and ordered to return to the police station. I was instructed to go to Chief Barrow's office where Chief Barrow, Sgt. Lanning, Lt. McCray and Mr. McCarley were gathered.

4. I became suspicious of earlier comments made by Sgt. Lanning in my meetings with him about the allegations of misconduct against Chief Barrow and later comments that I had not followed procedures. For that reason and in an effort to protect myself from possible later criticism or retaliation for my role in the investigation, or that I might be made a "scapegoat," I tape recorded my meetings with Sgt. Lanning and Lt. McCray on August 2, 1990, and the later meeting with Chief Barrow, Sgt. Lanning. Lt. McCray and Mr. McCarley. Attached hereto as Exhibit "A" and made a part hereof for all purposes is a true and correct copy of the transcription of the recordings I made during those meetings on August 2, 1990. This transcript is identical to that

transcript attached by the Defendants to the Motion except for those portions underlined and initialed by me.

5. I went back to the police station on August 6, 1990, after my scheduled three (3) days off and after going to a funeral in Corpus Christi, and spoke to Chief Barrow about my status as a patrolman in the Kerrville Police Department. Earlier on that date, I spoke to Lt. McCray and she agreed I had said I was not quitting on August 2. I told her my name had been scratched off the shift schedule and she said she didn't know who had done that. She didn't know what my status was. Later in the day I saw Chief Barrow. He informed me that I had resigned. I told him that I had not resigned. I then proceeded to the office of Mr. McCarley and again

inquired as to my status and he stated that I had resigned. I told him I had not resigned. He also made the statement to me at such time that I would never be treated the same by Chief Barrow when we discussed my continuing to serve in the department. I tape recorded my conversation with Mr. McCarley and attached hereto as Exhibit "B" is a true and correct transcription of such recording, which is made a part hereof for all purposes.

6. After the foregoing, I contacted Mr. William McQuillen, an attorney. I also later delivered a letter to Lt. McCray requesting a hearing. Mr. McQuillen delivered a letter to Chief Barrow seeking the grounds for my termination and requesting a hearing. Attached hereto as Exhibit

"E" and made a part hereof for all purposes is a true and correct copy of the correspondence I received from Chief Barrow in response to the correspondence of Mr. McQuillen.

7. I was given a hearing before Mr. McCarley on September 12, 1990, even though it had been the earlier position of Chief Barrow that I was not entitled to a hearing because of my alleged resignation. Chief Barrow, Sgt. Lanning and I were present and they testified at this hearing. A court reporter prepared a transcript of this hearing and attached hereto as Exhibit "C" is a true and correct copy of such transcript I obtained of the hearing. It is an accurate transcription of these proceedings. I also received a letter signed by Mr. McCarley and Chief Barrow,

a true copy of which is attached hereto as Exhibit "F" and made a part hereof for all purposes, stating their "positions" in this matter.

8. During the appeals process, Chief Barrow and Mr. McCarley made statements to the media concerning my appeal and purported facts involving my role in the investigation. Attached hereto as Exhibit "J" is a true and correct copy of an article appearing in the Kerrville Daily Times on September 30, 1990 containing their comments. These comments imply that I refused to cooperate in the investigation and was intent on pursuing my own investigation of Chief Barrow. These statements are not true and Chief Barrow and Mr. McCarley knew or should have known such statements were not true.

9. After the hearing before Mr. McCarley, I appealed his decision by requesting a hearing before Mr. Glenn Brown, the City Manager of Kerrville. This hearing was held on October 4, 1990, I was present, and attached hereto as Exhibit "D" is a true and correct copy of the transcript of a tape recording Kerrville made of this hearing. It is an accurate transcription of these proceedings. Prior to this hearing, my attorney had requested this to be an open public hearing in correspondence addressed to Mr. Brown, dated October 3, 1990, a true copy of which is attached hereto as Exhibit "G" and made a part hereof for purposes. My attorney made this request again at the hearing. In such correspondence he also provided Mr. Brown a list of witnesses he requested to

be present at the hearing. At the hearing Mr. Brown refused to open the hearing to the public and Mr. Brown and Chief Barrow made little effort to have the requested witnesses present for the hearing. Most were not present. Sgt. Lanning was stated to be "unavailable."

10. After the hearing, Mr. Brown delivered a letter to me dated October 22. 1990, setting forth his decision, a true copy of which is attached hereto as Exhibit "H" and made a part hereof for all purposes. Statements in this correspondence that I had undertaken an investigation on my own, thereby bypassing the Internal Affairs Division and that I had refused to cooperate are not true. This correspondence was published after such date in local newspapers in the Kerrville area. It is

my understanding Mr. Brown provided this correspondence to the media. I did not consent to his taking that action. Furthermore, Mr. Brown in his letter stated that he would reinstate me, or give me a "second chance." I believed this implied some sort of wrongdoing on my part. He furthermore stated that I would not receive any back pay from August 2, 1990 until the date of my reinstatement. I felt this was unfair as I had done nothing wrong and had not resigned. I was also concerned about reinstatement as Mr. McCarley, as stated above, had informed me I would never be treated the same be Chief Barrow. I felt it would only be a matter of time before Chief Barrow would find some other reason to terminate my employment.

11. My attorney received that

correspondence of Mr. William M. McKamie, dated March 5, 1991, a true copy of which is attached hereto as Exhibit "L" and made a part hereof for all purposes, offering me a public hearing on March 15, 1991, after suit had been filed. It appeared this hearing as offered by Mr. McKamie would have allowed an official of Kerrville to decide what was "relevant" and there was no offer to guarantee the availability of witnesses and documents. There was likewise no identification of the "official," who would preside at this hearing. I had already experienced the situation where the presiding officials at my earlier hearings had not been impartial, and in fact, were witnesses themselves to the events in this matter.

12. All of the tape recordings that I made and used as exhibits to this

Affidavit have been accurately transcribed and are correct and authentic. Each of such exhibits is made a part hereof for all purposes. My recording device is capable of recording conversations and testimony and I am competent in operating such device. The recordings have not been changed, altered, deleted, added to, or edited in any way. The recordings have continued in my possession since the date they were made, however, I did provide duplicates of such recordings to Mr. Brown prior to his hearing on October 4, 1990. While the speakers were not advised I was recording their statements, their statements were voluntary. The transcripts of the recordings identify each of the speakers, each of whom I am personally acquainted. There has been

included a short narrative prior to each meeting setting forth those present and the date of such meeting.

13. Since the date of my termination of employment from the Kerrville Police Department I have found it very difficult to obtain other employment. I was a dorm director at Schreiner College for a period of time, but received room and board from such employment with only a meager salary. I have submitted numerous applications for employment with area law enforcement agencies, but have been denied employment by all of them. They are reluctant to hire me as a result of the characterization placed upon my reputation as a "renegade cop" and because of this lawsuit. Prior to my termination of employment with the

Kerrville Police Department I had always received satisfactory evaluations for my job performance and had never been disciplined. I also tried to obtain a job as a dishwasher when my attempts to start a private investigator business proved unsuccessful. I was desperate for money and was being pursued by my creditors to pay my bills. I felt depressed in having to seek such employment after having served as a Sergeant in the Marine Corps in Viet Nam and after having achieved my life long aspiration to be a police officer. I particularly had wanted to become a member of the Kerrville Police Department and work in my adopted home town. I had often stated to fellow officers and friends it would take a big stick to drive me away from the department. I

have suffered severe depression, anxiety, worry, humiliation, lack of concentration, stomach problems, and low self esteem as a result of my termination of employment with the Kerrville Police Department. I have endured periods of being unable to sleep at night and periods of extreme nervousness. I have seen physicians and psychologists for this condition. I am presently employed at Ferris Rental Tools in Kerrville, Texas doing odd jobs such as loading and unloading equipment, however, at much lesser salary than my prior employment with the Kerrville Police Department.

14. Further, Affiant sayeth not."

ss/_____
David Gillum

SUBSCRIBED AND SWORN TO BEFORE ME on the 27th day of April, 1992, to certify which witness my hand and official seal.

ss/_____
Notary Public
in and for
The State of Texas

[The exhibits referred to in this Affidavit have been excluded as they, with the exception of the tape transcripts, are not material to the issues in the appeal to this Court. The tape transcripts are found in the Appendix, pp. 75-157.]

Supreme Court, U.S.
FILED
DEC 17 1993
OFFICE OF THE CLERK

No. 93-794

In The

Supreme Court of the United States

October Term, 1993

DAVID GILLUM,

Petitioner,

v.

THE CITY OF KERRVILLE, TEXAS, GLENN D. BROWN, IN HIS OFFICIAL CAPACITY AS CITY MANAGER AND HIS INDIVIDUAL CAPACITY, LOUIS A. BARROW, JR., IN HIS OFFICIAL CAPACITY AS POLICE CHIEF, AND IN HIS INDIVIDUAL CAPACITY, KIRK MCCARLEY, IN HIS OFFICIAL CAPACITY AS PERSONNEL DIRECTOR AND IN HIS INDIVIDUAL CAPACITY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court should overrule *Connick v. Myers* and *Rankin* to give way to Petitioner's own analytical framework in cases involving freedom of speech within the context of governmental employment.

2. Whether the Court of Appeals followed the decisions in *Connick* and *Rankin* in deciding that the Petitioner was not speaking on a matter of public concern.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is dated September 16, 1993, is reported at 3 F.3d 117 and is reprinted in the Petitioner's Appendix, pp. 1-24. The case number is 93-8006. The prior Order and Judgment of the United States District Court for the Western District of Texas, San Antonio Division, were entered on November 30, 1992.

The case number is SA-91-CA-0090. The Order and Judgment of the District Court are reprinted in the Appendix to Petitioner's Writ, pp. 26-74.

JURISDICTION

Respondents agree that this court has jurisdiction for discretionary review under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment of the United States Constitution is set forth in the Petition and need not be repeated here.

STATEMENT OF THE CASE

Respondents agree with the Factual Background set forth in the Court of Appeals' opinion. The following details are offered to assist the court in evaluating these issues in context, as required under the tests set forth in *Connick v. Myers* and *Rankin v. McPherson*. Each of the relevant conversations were secretly taped by Mr. Gillum, and portions noted herein are contained in the appendix to the Petition or to this Response.

The City of Kerrville, Texas is located in south central Texas, and has a population of about 17,384. It has a Council/Manager form of government, and departments that administer City affairs. The City Manager was Glenn Brown. The personnel department was headed by Kirk

McCarley. [R 280] Louis A. Barrow was the police chief in January 1990.

Chief Barrow had made changes in the Department after arriving, and all of the officers did not readily accept his more formal approach for their department. One of his actions was to adopt a written policy for internal affairs investigations in the Department. It is undisputed that Policy 90-06 was in effect, and it appears in the appendix. That policy provides at pages 927, and 934 for the assigned internal affairs investigator to handle all investigations. The policy requires officers to refer all matters falling under the policy to that person, and further requires written statement to be taken in connection with investigations. [R at 930, 931] It further states: "NO PERSON, OTHER THAN THE ASSIGNED INTERNAL AFFAIRS INVESTIGATOR, WILL INVESTIGATE PERSONNEL COMPLAINTS. THIS INCLUDES CONTACTING WITNESSES, COMPLAINANTS, AND OTHERS INVOLVED. IF INFORMATION REGARDING A COMPLAINT COMES TO AN EMPLOYEE'S ATTENTION, HE SHALL FORWARD IT TO INTERNAL AFFAIRS. REQUEST FOR ADDITIONAL INVESTIGATION SHALL BE MADE IN WRITING THROUGH INTERNAL AFFAIRS." The policy provides for any member of the department being investigated to be informed of the charges, and to have an opportunity to respond. [R at 930, 934, 942] Defendants have admitted that it does not have a provision for investigations of the Chief, and that fact is noted by the District Court. However, the procedure does state that it applies to police or member misconduct, provides that any criminal matters investigated by Internal Affairs are to be referred to the Criminal Investigative

Division for the preparation and filing of any criminal charges and requires the Internal Affairs Investigator to "MAINTAIN LIAISON WITH THE DISTRICT ATTORNEY'S OFFICE IN THOSE INSTANCES WHERE AN OFFICER OR EMPLOYEE HAS BEEN CHARGED WITH, OR IS INVESTIGATED FOR ALLEGED CRIMINAL CONDUCT." [R at 946]

David Gillum was a patrolman in the police department. He had been working for the City since 1987. He had previously been the subject of friction and disagreement with Chief Barrow. [R 01085] He had never been disciplined by the Department. [R 282]

About August 1, 1990 David Gillum went to Rosie McCray and told her that he had heard about someone claiming that they had partied and smoked dope with the Chief. Gillum then went to Sergeant Joe Lanning, the assigned head of the Internal Affairs division, for guidance on how to handle the information he had received. [R 688-702] He does not claim to have told Lanning about any apprehension or concern about Lanning's involvement. According to Gillum, Lanning expressed doubt about the truth of the information. Nevertheless, it is undisputed that he permitted Gillum to go and interview the person that had reportedly uttered the statements. [R 993]

As noted by Chief Barrow in his Respondent's brief, Gillum later explained himself to McCarley and made it clear that he was not making an allegation or complaint. However, as shown by the context of the recorded conversations, David Gillum reacted to being taken off of the investigation before he was ready to take a position, and

refused to follow the written internal policy if Lanning was to handle the process.

Gillum interviewed Cheryl Schilling and she denied that any such thing occurred. Gillum came back to Lanning on August 1, 1990 late in the afternoon and reported the conversation. He says that he told Lanning that he had taped the interview, but he did not provide the tape. Lanning gave him permission to go and interview another witness that had been identified by Schilling. [R 01047] Gillum had expressed no reservations about dealing with Lanning at this point.

Chief Barrow, who has heard of the allegations, meets with Lanning. Lanning says that he told the Chief what he was doing. [R 00310] Gillum, of course, sees conspiracy in this contact, whatever may have been said. Lanning had contacted his superior, Chuck Dickerson, and the Personnel Director, Kirk McCarley, about the allegations and his intention to let Gillum look into it, to make sure that he was acting appropriately, and that people higher up were aware of the situation. [R 996]

Lanning calls Gillum back to the office. This time, Gillum tapes the conversation with Lanning. The transcript is in the record [R 00686]. Lanning states that he has talked to the other witness (Debbie) already. He tells Gillum that "I would like you to be assured yourself, you know that everything is on the up and up, and on the same hand I looked over the directives again. All internal investigations have to be handled through this office." He tells him " . . . I want to make sure that we are not dealing out of the guidelines by you being involved in an internal investigation and get yourself on a hook because I told

you to go ahead and keep doing it. I can't do that." [R 687; Pet. App. 76-78] Gillum acknowledges that Joe is talking about having everything written up and signed, and Lanning tells him the reason for that is the seriousness of the allegations about the executive of the Department. Lanning further says that he does not want Gillum to think he is just trying to get him "off of this thing." Gillum says that is precisely what he is thinking. [R 688] Questioning the application of the guidelines without a written complaint, Gillum suggests that he only came to him as a friend, about whether or not he was doing it right. Lanning explains that "We are not doing it right by procedures . . . You're talking about members of this department . . . And the only people to investigate members of this department is this division." [R 688; Pet. App. 80-81]

Then Mr. Gillum begins to talk about his own personal problems and attitudes about the way the department is run and the complaints in the ranks about the administration. This discussion includes promotion and testing, treatment of former officers coming off of drug task force duty, the amount of paperwork, and the changes in the department's expectations about documenting police work. [R 691-693] Gillum does not state any reason that he opposes the procedure or Lanning's investigation. Lanning tells David that the Chief's supervisor is aware of the issue. [R 693; Pet. App. 91] Lanning tells Gillum that he intends to do a full documented investigation since he perceives that a "cover up" claim will be the next rumor. [R 694] Lanning directs Gillum to give him a written statement about the matter, and Gillum refuses. [R 695; Pet. App. 95] Lanning calls in Gillum's supervisor, who also orders him to give a statement and he refuses. [R 696-699]

Gillum has admitted that the policy was being correctly applied by Lanning [R 00393]; that a proper investigation would require a written statement from Gillum [R 00395]; that Joe Lanning was in error for authorizing his initial involvement, [R 00395]; that he wasn't surprised when Joe reversed his decision. [R 01094] He also admits that Lanning said it would be investigated. [R 00867]

After twice refusing to follow the policy and give a written statement, Gillum was called into a meeting with McCray, Lanning, McCarley and Barrow. The meeting was also secretly taped by Gillum. The transcript is a part of the record [R 00700; Pet. App. 102-140].

The Chief tells him that he knows what the allegations are. He immediately points out that the reason that the Personnel Director is present "to see to it . . . that the investigation is handled properly." [R 00702] He stated that "If its not innuendo then we'll prove its not innuendo . . . ok? and continued that "If I'm guilty of misconduct, Mr. McCarley is here to see to it that something takes place." [R 00700-00702]

Gillum states again that "I went to Joe for advise, not a complaint." [R 00702; Pet. App. 107] He does not discuss the allegations, but only refers to them. He agrees that prior rumors about the Chief have proven erroneous. Then he begins to talk about morale problems and mistrust, and how the Chief is pushing the Beaumont way in Kerrville. Nevertheless, he agrees that morale was real bad even before Barrow was hired as Chief. [R 00702-00705]

Gillum explains that he was checking the allegation out and "I was told not to . . . period! That somebody else would check it out." [R 00707] McCarley responds by

telling him "That . . . that's procedure. That's protocol . . . You, you gotta have procedures, I mean . . . And this is the . . . man that you need to go to when you have a complaint. And that's how . . . how a complaint is lodged. And its up to him to investigate." [R 00707; Pet. App. 118-119] Gillum admits that following the correct investigation procedure was one of McCarley's stated options. [R 00868]

Gillum responds that he "didn't have all his stuff together to take it to Joe to even complain. But, now I'm told I can't do nothing about it." Chief Barrow replies "That's not true! You can give your information to Lt. McCray and to Sgt. Lanning and let them do the investigation. That's what you are being told you can do. You want me to leave, I'll leave, David. 'Cause I want this shit stopped! Now either you cooperate with these people, or you don't." [R 00708]

Gillum questions whether Joe Lanning is biased, and they argue about how Joe was selected and whether he can be trusted to find out the truth. His direct Supervisor, Lieutenant Rosie McCray reminds him that it is Joe's job, and he "knows when he gets a complaint, he has to handle it . . . And regardless of who he's investigating, he has to be fair, or else he's in trouble. If it comes out down the line that he covered up something, well then he's in it, too! I feel Joe would be fair about anything, even the Chief . . . Anything he come up with, and you're not satisfied with, you can appeal it. There's always someone higher you can go to." [R 00708-00709; Pet. App. 123-24]

Gillum then recites that he has interviewed the girl, and that "she denied everything, other than the party

itself . . . or gathering. But no dope was involved. She mentioned another person, I was gonna go talk to her. If, in fact, she denied the same thing, then what else am I gonna go, where else am I gonna go? I'm gonna have to come to you and say Joe, I found this and this and that and it's . . . that's it, I can't . . . there's nothing there." [R 00709]

Joe Lanning replies that "The problem here, David, though, is that you are not the one person to investigate internal problems. That is for my division, and you were told that, under those circumstances, and you have been told to cooperate with this investigation to it's fullest, which you have refused to do." Gillum agrees and says "That's how I stand, right there." and again refuses to cooperate with any questions that Lanning might ask with regards to his investigation. [R 00709-00710; Pet. App. 126]

Gillum then reveals that "there's nothing that can happen right now that would satisfy me . . . my mind . . . and I realize that's it's just mine, uh, that would make me say, yeah, Alwin Barrows does not smoke grass. There's nothing that could happen now." [R 00710; Pet. App. 128]

The discussion continues about whether there is any way that a patrolman can work in a department with no trust in the Chief. Kirk McCarley reminds Gillum again that "this is just a procedure . . . You have a procedure, whereby if you have a problem, to go through, you just tell your commanding off . . . your lieutenant, who then refers your internal affairs person to investigate." [R 00711] Lanning explains what he needs to continue. [R 00712]

Kirk McCarley says that it sounds like Gillum wants to continue the investigation on his own. He says that Gillum can let it drop or let the charge be brought to internal affairs, "which is your procedure, free and clear. And that's all there is, you have two choices here. We're not gonna force you out." [R 00712-00713]

After the Chief leaves the room, Gillum says that he is not going to compromise his badge, takes it off and lays it and his gun on the table and leaves. He goes down the hall and tells the dispatcher, Larry Rhodes, that he did not quit. He did not clean out his locker or submit a formal resignation. [R 00714]

David Gillum reported back for work on his next scheduled day. He inquired about his job status. [R 00715-00719] He states that he was told by McCray that she did not know. He is told that he quit. [R 00715] He meets with McCarley who asks him again why he would not cooperate with Lanning under department policy, and Gillum refers to "my investigation", saying "When I had the whatever evidence or lack of evidence, considering Joe knew about it, I would have given it to him." He further states that "Because I am going to find out before I file a complaint . . . I'm going to investigate first." [R 00716-00717]

Gillum requested and received before the Barrow and McCarley. The transcript of the hearing is in the record at [R 00720]. After this hearing, Gillum appealed to the City manager. A closed hearing was held before Glenn Brown on October 4, 1990, although Gillum's counsel requested that the hearing be open under the Open Meetings Act. [R 00992] Glenn Brown hears the matter and makes a

decision by letter dated October 22, 1990 [R 00923]. He addresses the controversy, expresses his reasoning and decides that Gillum sincerely "did not feel he had resigned". He offers him reinstatement to his position, but does not indicate that he is to be awarded back pay. His letter comments on developing a good working relationship for the future. [R 00923-00925]

Gillum did not accept his job back. He filed suit on January 25, 1991. The City offered a name clearing hearing on March 15, 1991, but Gillum did not attend.

On February 24, 1992, the Plaintiff/Petitioner was convicted of the felony offense of aggravated assault of a peace officer with a deadly weapon. As a result of this conviction, Plaintiff can no longer be employed as a police officer.

REASONS FOR DENYING THE WRIT

A. Summary of the Argument

1. Continued Viability of the *Pickering* and *Connick* Tests

At issue in this case is the context of Gillum's statements. Whether or not a public concern exists must be determined as a matter of law from all of the facts and circumstances. Defendants do not believe a First Amendment claim arises when an employee accompanies insubordinate refusal to follow an ordinary written procedure with an explanation of why he does not agree with the process or his decision that the assigned investigator is not acceptable to him.

Under the standards of *Connick v. Myers* and *Rankin v. McPherson* the Court of Appeals properly evaluated the context of Gillum's statements and found that his own interests as an employee were at issue. No modification of the principles in this Court's cases is necessary in order to protect the right of free speech in the government work place. The current standard allows any employee to speak as a citizen, while recognizing that a police department cannot be "a roundtable for office complaints over internal affairs." The police officer's obligations under an Internal Affairs procedure cannot be evaluated in the same context as a town meeting.

2. A Correct Legal Result on These Facts

Where a public employee is required to make a true statement under oath of his information and involvement, informed that all witnesses will be interviewed and written statements obtained, assured that he will be given an opportunity to see the statements, told of his right to appeal in the event of disagreement, and assured that the superiors of the Chief will be monitoring the process, no public concern is implicated by this officer's insistence on the right to be the investigator, or to veto the process established by the department.

This case involves Gillum's own role in the process. The issue of his opinions arose only in the context of his disappointed intentions. He was making no allegations or complaints himself. He was not seeking to have others investigate wrongdoing, as is the case in many First Amendment disputes, but to do it himself. By his own statements, he was prepared to follow the rules only after

he had met his own investigative standard. [Pet. App. 150] In the controversy fomented by David Gillum's acts/explanations, the Chief was not the issue, the issue was what David Gillum was required to do. Under the correct standards, the Court of Appeals correctly concluded that no public concern was involved, as a matter of law.

B. Continued Viability of the *Pickering* and *Connick* Tests

This court's opinion in *Rankin v. McPherson*, 107 U.S. 2891 (1987) says, "The determination whether a public employer has properly discharged an employee for engaging in speech requires 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Id.* at p. 2896 (citing *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 568 (1968)).

This principle is just as sound, and just as necessary today.

The roundtable discussion from Kerrville, Texas, excerpted above in the statement of this case, calls to mind the language from *Connick v. Myers*, 461 U.S. 138 (1983), "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark-and certainly every criticism directed at a public official-would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment

does not require a public office to be run as a roundtable for employees' complaints over internal office affairs."

Connick was this court's dividing line between the role of a worker, subject to supervision – and the role of a citizen, in his own government. It is necessary to enable *operation* of the government workplace and preserve the citizen/employee's right to speak. The court recognized that public employees were not entitled to demand consensus on running the office. It required that, "Whether an employee's speech addresses a matter of public concern must be determined by content, form, and context, of a given statement, as revealed by the whole record." *Id.* at 1690.

Having performed this analysis, the Court observed that, "While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions represent one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre."

The Court of Appeals reviewed these same types of considerations in the context of Gillum's employment dispute, in a manner that is just right. It recognized the key importance of his own displeasure at being supplanted, and his purposes in acting and reacting as he did. It recognized that issues of concern to the public in a different context, or in a different forum, were not public issues in the context of Gillum's dispute over *his* role.

The Fifth Circuit applied these same principles in *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), cert. denied, 479 U.S. 1064 (1987) an

opinion directly founded upon *Connick*. Building upon this foundation, in a manner distinctly reminiscent of Ms. Myers, the Court of Appeals held that no public concern was involved here, "To be sure, corruption in an internal affairs department is a matter of public concern. Gillum's focus was, however, on this issue only insofar as it impacted his wish to continue his investigation." Pet. App. 11.

This case fits the "roundtable" analogy. The meeting that transpired would never happen in many departments. Kerrville officials engaged in a roundtable with David Gillum over his own role in the process, but he emerged unmoved. Four days later he still insisted on the right to satisfy his own investigative standard before taking a matter to Internal Affairs. [Pet. App. 146-147, 150] *Rankin v. McPherson* recognized that, "On the one hand, public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." *Id.* at 386.

The logic of a test that does not grant a jury trial in every dispute over an employee's own job is no less compelling than the day that *Connick* was written. In this case the logic is compelling, since the statements arose only in the context of Gillum's own duty, role, and orders.

The rationale of this court's cases properly allows consideration of the differences in particular public environments, in deciding when a public concern is involved.

Petitioner would have the court ignore or abandon the contextual "as a citizen" language quoted from *Pickering* in evaluating this case. That language correctly recognizes the dual role of employer/employee and government/citizen. It must be a factor in determining the public concerns involved and balancing the interests involved, or "roundtable" management would be inevitable.

The cases noted by Petitioner do not demonstrate conflict or unpredictability. They demonstrate the infinite fact situations in which the test must be applied, and the need for a standard which recognizes the "citizen" distinction. Most importantly, none of the cases are a good fit or apt comparison.

In *Brockell v. Norton*, 732 F.2d 664 (8th Cir. 1984) the police officer followed the proper policy in the chain of command initially, and spoke outside of channels after nothing happened. In considering Gillum's case, the Court of Appeals noted, "Had he submitted his statement and later found it was ignored, he might have complained or 'gone public.' Firing Gillum for those acts would have presented a quite different case." [Pet. App. 12]

Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988) held that a topic, otherwise of public concern, did not lose its importance just because it related to disagreements with superiors. However, Hall's alleged statements were public statements, implicating his role as a citizen, and not just an employee.

Buzek v. County of Sanders, 972 F.2d 992 (8th Cir. 1992) involved a police officer that wrote a letter to a Judge in connection with sentencing. Buzek was not refusing to

perform a duty, and his speech was outside of the organization.

In *Conaway v. Smith*, 853 F.2d 789 (10th Cir. 1988) the electrical inspector made public comments, responded to the news media, filed internal reports, and reported to the City Administrator his *own knowledge and complaints* about his supervisors.

Wulf v. Wichita, 883 F.2d 842 (10th Cir. 1989) involves a several year period of continuing disputes. Communications among members of the Fraternal Order of Police, a letter to the Attorney General, and information in the press were the expressive conduct. It overlaps this case only to the extent that there was an "official investigation", and a refusal to respond until counsel was consulted. It clearly involved issues beyond Wulf's personal relationship as an employee.

Solomon v. Royal Oak Township, 842 F.2d 862 (6th Cir. 1988) did not involve any controversy over Solomon's duty or performance, and arose from statements to the press.

Marshall v. Allen, 984 F.2d 787 (7th Cir. 1993) involved support of *other* Plaintiffs in litigation against a housing agency. That opinion reads the *Connick* test to require an evaluation of the *point* of the speech in question. It recognizes that the employee may bring up issues of public concern in a context of private interest or advantage, posing the inquiry: " . . . was it the employee's point to bring wrongdoing to light? Or was the point to further some purely private interest?"

Maciariello v. Sumner, 973 F.2d 295 (4th Cir. 1992) involves the personal interest and animosity of two officers motivating their own investigation. Applying the *Connick* test, it notes that this motivation detracts from the professed interest in exposing official corruption. It recognizes that a topic may be of public concern, but the issue, in context, may have only private and personal character.

This court has recognized that police departments have legitimate interests in discipline beyond that of the ordinary government office. *Kelley v. Johnson*, 425 U.S. 238.[1] It has also recognized that, in a sense, every aspect of operating a government office is of "public concern."[2] These issues underscore the need for the dual role analysis of *Connick*. Petitioner states that the employee will always be wearing that "hat," but misses the point that every statement by a police officer on the subject of his employment cannot be of public concern. Every time a police officer has a dispute about policy or procedure a public concern does not arise. Where the employee speaks only when his own involvement is at issue, and only within the environment of his supervision as an employee, he has not stepped out of the zone of purely private concerns.

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[1] *Maciariello*, supra, states that "Policemen are at the restricted end of the spectrum because they are 'paramilitary' – discipline is demanded, and freedom must be correspondingly denied." Citing *Hughes v. Whitmer*, 714 F. 2d. 1407, 1418 (8th Circuit 1983), cert. denied. 465 U.S. 1023, 104 S. Ct. 1275, 79 L.Ed.2d 708 (1976).

[2] *Connick*, at 1691.

The court's current test is the correct one. The "clear impairment" test urged by Petitioner, at least as applied to police departments, would constitutionalize every workplace dispute over policy and assigned employees.

C. A Correct Legal Result on These Facts

The review of the record for both the public concern and balancing of interests is a matter of law. *Rankin*, at 386. Petitioner's citations to a fact based standard for summary judgments do not apply to the Court's rulings on these issues. The Court is to look to the entire record on the question of law, and the Court of Appeals clearly did so.

The Court of Appeals correctly evaluated the context of Gillum's statements. It considered the "personal" issues involved, the time when Gillum's statements were made, the wholly supervisory context, and the assurances that he retained his rights to "dissent". These issues were properly considered, and should be determinative. These factors show this to be a dispute about whether Gillum was to follow the rules like everybody else, or had a veto power under the First Amendment.

This case is not about a Police Chief's criminal misconduct, so clearly a matter of public concern that it was admitted by the Defendants in their original Response. Gillum expressed no opinions about the Chief's misconduct, he just took the information he had to Lanning and asked for advice. [R 00702] Gillum did not engage in any

"expression" until told that he was not going to continue the investigation.[3]

The Court of Appeals correctly analyzed this case not as a "complaint" that Gillum made, but a refusal to cooperate with someone else's investigation of the subject matter. Mr. Gillum did not follow the internal procedure for a complaint, and he did not exercise his right to speak in a different forum, he just "clammed up" and refused to move.

As such, Gillum's status here was not over-emphasized by the Court of Appeals. No confusion resulted from the distinction between his interests as an employee versus his interests and rights as a citizen.

At no time was David Gillum criticized for bringing the facts of the complaint to the attention of Lt. Rosie McCray or Lt. Joe Lanning. At no time were any restrictions placed upon his right or authority to speak publicly. At no time did he speak or attempt to speak in any forum concerning the conduct of the Chief, or the viability of the investigation. He merely refused to answer questions or to cooperate further in the internal process, once he decided that he was suspicious of Lanning's actions. He did this in spite of the explanations and assurances made to him that a full investigation would be conducted, and that he could have access to the material, and appeal it if he disagreed. [R at 00709] The Chief offered to leave the

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[3] Defendants believe that an employee that processes or handles information is not thereby "speaking" about it in a First Amendment sense. Gillum has insisted all along that he was not making a complaint against the Chief, and was not factually prepared to do so.

meeting before Gillum said anything about his presence. [R at 00708, 00711] For an innocent man to say he intended to clear his name is no more than Gillum expected. [R 00836] It is a great irony that this Plaintiff claims First Amendment rights, when he was being asked to make a full written statement concerning the matter, and continually refused.

Terrell v. University of Texas System Police correctly applies *Connick*, and is firmly founded on its principles. As shown by the footnotes, it finds its support in the *Connick* conclusion that personal employee concerns may be *either* public or private issues in the first amendment sense.[4] It properly relies upon *Connick* in giving weight to the absence of public reporting, and the fact that Gillum was not making an allegation of wrongdoing.[5]

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1978), did not involve a dispute about the employee's role in carrying out a policy. It was characterized by this court in *Connick* as a case "where an employee speaks out as a citizen on a matter of general concern, not tied to a personal employment dispute, but

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[4] "We view the questions pertaining to the confidence and trust that Myer's co-workers possess in various office supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myer's dispute over her transfer to another section . . . " *Connick*, at 1690.

[5] "Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing . . . on the part of Connick and others." *Connick*, at 1691.

arranges to do so privately." *Connick* at 1691, n.8. It stands only for the proposition that the private nature of the communication does not end the inquiry. That opinion further supports the Court of Appeals' evaluation under the citizen/employee distinction. It further notes that, "Private expression, however, may in some situations bring additional factors to the Pickering calculus."

In our case, the conflict is solely over Gillum's investigation. It involves the very relationship between a police officer and his department. Upon it depends the ability of the department to require documented, full and complete investigations, with the cooperation of all that have information.

CONCLUSION

The Petition should be denied. The court's current test is the correct one. It protects the rights of the citizen/employee, but allows efficient operation of government offices. The "clear impairment" test urged by Petitioner, at least as applied to police departments, would constitutionalize every workplace dispute over policy and assigned employees.

The Court of Appeals correctly applied the principles set forth in the opinions of this court. Just like the concerns of Ms. Myers, Gillum's focus was on his role and his assignment. Allowing Gillum to veto the assigned investigator in the context of this entire record would

certainly create a roundtable for employee complaints over internal office affairs.

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Supreme Court, U.S.
FILED
DEC 17 1993
OFFICE OF THE CLERK

No. 93-794

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

DAVID GILLUM,

Petitioner,

V.

THE CITY OF KERRVILLE, TEXAS, GLENN D. BROWN, IN HIS OFFICIAL CAPACITY AS CITY MANAGER AND IN HIS INDIVIDUAL CAPACITY, LOUIS A. BARROW, JR., IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE AND IN HIS INDIVIDUAL CAPACITY, AND KIRK MCCARLEY, IN HIS OFFICIAL CAPACITY AS PERSONNEL DIRECTOR, AND IN HIS INDIVIDUAL CAPACITY,

Respondents

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT, LOUIS A. BARROW, JR.

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QUESTIONS PRESENTED

1. Whether the Supreme Court should overrule *Connick v. Myers* and *Rankin v. McPherson* to give way to Petitioner's own analytical framework in cases involving freedom of speech within the context of governmental employment.

2. Whether the Court of Appeals followed the decisions in *Connick* and *Rankin* in deciding that the Petitioner was not speaking on a matter of public concern.

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UNITED STATES CONSTITUTION

First Amendment 2, 6, 8, 9, 10

BRIEF OF RESPONDENT, LOUIS A. BARROW, JR.

Respondent, Louis A. Barrow, Jr., submits this brief to demonstrate that the Petition for Writ of Certiorari should be denied.

COUNTER STATEMENT OF THE CASE

The decision of the Court of Appeals accurately states the facts of the case.[1] Respondent makes the following statement to clarify or correct some of the statements expressly or impliedly made in the petition for *certiorari*.

The Petitioner identified the "speech" at issue here as speech that was critical of irregularities he perceived in the investigation of possible wrongdoing by the Chief of Police and of the bias of the assigned investigator. Pet. 27-28. The central issue in the District Court and the Court of Appeals was whether at the time the Petitioner spoke about these matters he was speaking as a citizen on matters of public concern or as a police officer embroiled in a personal dispute over his involvement in the investigation of allegations of misconduct against the Chief of Police. To bring this case within the protection of the First Amendment, the Petitioner attempts to impart a character of "public concern" to his recounting to others of the allegations of misconduct against the Chief of Police and his discontent about the course that his investigation had taken.

In the statement of the case, the Petitioner misleads the Court insofar as he uses the word "report" to imply that Petitioner's speech took the form of an accusation, a charge or complaint of misconduct against Respondent Barrow.[2] This is significant because the Petitioner consistently maintained throughout the proceeding in District Court that he did not go to Lanning, the officer in charge of Internal Affairs, and McCray, his supervisor, to make a complaint against

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[1] The Petitioner covertly recorded most of the conversations during the meetings that are relevant to the disposition of the issues and on which he bases his claims. The transcript of these conversations are at App. 75-157. The facts are not controverted to the extent of what was actually said during such conversations.

[2] *See* Pet. 4,5,6,7,9,11.

Respondent Barrow. The fact that Petitioner did not want to make a complaint, but only sought advice on what to do with his information, sets the tone of the Petitioner's involvement in the investigation and supports the Court of Appeals' finding that the Petitioner was not speaking as a citizen on a matter of public concern.

In the Petitioner's own words, the purpose of his conversations was to "obtain advice" regarding the correct procedure to undertake an investigation. App. 106,119,161,163-164. The following excerpt from the conversation between the Petitioner and McCarley better exemplifies what was implicated in Petitioner's "speech." The statements were made during a meeting between the Petitioner and McCarley on August 6, 1990, four days after Petitioner surrendered his badge and weapon.[1] The Petitioner went to McCarley to inquire about his status as an employee. App. 170-171. Several times, Petitioner said that he did not make a complaint against Barrow. App. 142, 142-143, 145, 147. He also said that he went to Lanning for advice, App. 144, and that:

> "... if in fact, the Chief is guilty, if in fact, the Chief is innocent, I wanted to make sure that I was doing the right procedures in my investigation. When I had the whatever evidence or lack of evidence considering Joe knew about it, I would have given it to him. Then he could have taken off with the investigation and done whatever internal affairs do with it."

App. 144. McCarley then said:

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[1] The Court of Appeals found that whether the Petitioner quit his job when he surrendered his badge and weapon or whether he was discharged for insubordination was a question of fact. App 10.

> "You should have come up to Joe and said like I have heard these rumors and I would like a formal investigation to be done on this particular case and that is the proper channels."

To which Petitioner remarked:

> "Well, that's not what is in the handbook. And that is not what is in our code. Uh ....or .. rules and regulations. I have never signed any forms saying that I am making an official complaint against the Chief. I have never had anything notarized." App. 144-145.

When McCarley asked why he did not file a complaint, the Petitioner said "[B]ecause I am going to find out before I file a complaint. . . . I'm going to investigate first . . . [Y]ou have to have probable cause." App. 150.

The Petitioner was allowed to investigate. App. 3. After Lanning relieved the Petitioner and Lanning took over the investigation, the Petitioner refused to cooperate with him. On two different occasions the Petitioner refused to reduce to writing what he knew about his investigation. App. 94-94,96-99. This led to the verbal confrontation on August 2, 1990 where the Petitioner again refused to cooperate, App. 119-120, and which culminated in the Petitioner surrendering his badge and weapon. App. 4-5. After several administrative hearings, on October 22, 1990, the City of Kerrville offered the Petitioner reinstatement without compensation for the time off duty. App. 6,175-176. The Petitioner was not satisfied and filed suit. App. 6.

III.
REASONS WHY THE WRIT SHOULD BE DENIED
A.
INTRODUCTION

As the first reason for review, the Petitioner challenges the wisdom of *Connick v. Myers*[1] and *McPherson v. Rankin*[2] on the basis that this Court's legal precedents are confusing. Petitioner proposes that the Court substitute the *Connick* "public concern inquiry" for the inquiry of whether speech "clearly impairs" the government's ability to function. The Petitioner suggests that "impairment" would be found when the speech would make it "impossible" for a government institution to carry out its duties or accomplish its legitimate objectives.[3] The Petition is without any coherent explanation of how this new approach in First Amendment questions will make the outcome more predictable and consistent in the difficult area of government employment speech. The argument is flawed, however, because, in its application, it ignores the purpose and values underlying the free speech clause.

The Petitioner argues that the Courts of Appeals' cases cited in the Petition are in conflict because the lower courts have applied a confusing standard. The cases are not in conflict and the opinions are reconcilable. These decisions reflect the application, in close cases, of a fact-sensitive standard. Difficulty, however, cannot be the sole consideration in deciding whether to modify or substitute, as Petitioner suggests, the public concern inquiry as a threshold question.

The writ should be denied because the analysis employed in the decision of the Court of Appeals does not conflict

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[1] 853 U.S. 138 (1983).
[2] 483 U.S. 378 (1987).
[3] Pet. 45.

with the decisions of this Court in *Connick* and *Rankin*. The Petitioner argues that the Court of Appeals may have erred in the proper application of the *Connick* and *Rankin* balancing test because of the confusion caused by the lack of clear guidelines in making the threshold inquiry.[1] The case at bar, as the same Courts of Appeals cases cited by the Petitioner, is the result of the application of the correct legal standard to a set of facts that is very particular to each case.

B.

THE SUPREME COURT SHOULD NOT SUBSTITUTE THE TEST PROPOSED BY THE PETITIONER FOR THE *CONNICK/ RANKIN* STANDARD.

The Petitioner's premise must assume that all speech in an employment setting is protected regardless of whether it is on a matter of public concern. Speech, under the Petitioner's "impairment" test, only loses its protected status when the government shows that a particular speech makes it impossible for the government to function as such. Under the Petitioner's proposal, the ability of a governmental agency to function determines whether the speech will be protected by the First Amendment. This is an extremist position, an all-or-nothing proposal that places the onerous burden on the government to show, not that the challenged speech affects the effectiveness of the government, but that it would make it impossible for the government to function.

The Petitioner ignores the fact that speech on matters of public concern is at the core of the First Amendment and receives the most stringent constitutional protection. There is a consensus that if the speech is not of public concern, there is no First Amendment protection against dismissal.[2] The Supreme Court has long held that not all kinds of speech

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[1] Pet. 57.

[2] See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-758 1985.

underlie the First Amendment.[1] The Petitioner's proposal disregards the distinction between speech on matters of public concern and speech on matters of private concern. This distinction directly addresses the fundamental values of free speech. The Petitioner's proposal is a radical departure from the traditional analysis of First Amendment issues in the employment arena and is not worthy of consideration by the Supreme Court.

C.
THE OPINIONS OF THE FEDERAL COURTS ARE NOT INCONSISTENT.

To persuade the Court that this case should be reviewed, the Petitioner also argues that the case results in the lower courts are inconsistent and irreconcilable in cases deciding that speech involves a matter of public concern. To support this proposition, the Petitioner, without analysis, and with only brief quotes, cites several cases. The common thread that ties these cases together is the courts' search for legitimate speech values in the challenged speech. Deciding whether a particular speech is protected is often not an easy task because the quest is extremely fact oriented. Different fact patterns will inevitably give rise to different results. The cases cited by the Petitioner stand for the proposition that there can be no black and white standard to analyze speech in public employment if one is to consider the competing interests involved. As we shall see, each case must stand on its own merits.

Marshall v. Allen, 984 F.2d 787 (7th Cir. 1993), and *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988), did not reach the merits of the First Amendment claim. *Marshall* is a qualified immunity case where the parties rigorously disputed many of the facts. The Court did not decide the First Amendment issue

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[1] *Id.*, at 758

on the merits, and it only held that in 1988 it was clearly established that verbal and nonverbal support of employees alleging sex discrimination dealt with a matter of public concern. *Hall* resulted from a dismissal under Rule 12(b)(6). On review, all of the allegations in the complaint were taken as true. The court held in *Marshall* that the appellant's allegations that he publicly voiced his concerns about various violations of the rules of the National Collegiate Athletic Association and the University of Columbia alleged a matter of public concern.

Maciariello v. Sumner, 973 F.2d 295 (4th Cir. 1992), and *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992), deal with communications to a Judge. In *Maciariello*, the Court of Appeals found that two police officers, while conducting an investigation of their own, not only discussed the suspicion of wrongdoing between themselves, but they went to a Municipal Court Judge and spoke to her about their suspicions. The Court of Appeals found that the conversation was protected speech; however, it held that the conversations were not a "but for" cause of the disciplinary action. In *Buzek*, a Deputy sheriff sent a letter to a Judge on behalf of a criminal defendant. The Court of Appeals found that the proper sentencing of a convicted criminal was a matter of public concern and held the speech was protected because the Defendants did not offer any evidence on the issue of whether the functioning of the sheriff's office had been impaired by the speech.

In *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), *Conaway v. Smith*, 853 F.2d 789 (10th Cir. 1988), and *Brocknell v. Norton*, 732 F.2d 664 (8th Cir. 1986), the 8th Circuit and the 10th Circuit Court of Appeals addressed First Amendment claims where the Defendants raised the issue that the speech in question was related to a personal matter or dispute. In *Wulf* the protected speech was a letter to the Attorney General of Kansas where the Plaintiff complained about violations of law by city officials. *Conaway* involved three incidents where the Plaintiff sought, verbally and in

writing, to bring to light actual or potential wrongdoing or breach of public trust by public officers. In deciding the issue of speech, the 8th Circuit Court of Appeals in *Brocknell* held that the facts before the court approached more closely the plight of a whistleblower who wished to report the misconduct of the immediate superior. 732 F.2d at 668. In all cases, the appellate courts found that the speech did not involve a private matter. The courts decided these cases in the context of the factual situation presented in each case while staying within the boundaries of the analytical approach of this Court's holding in *Connick*.

D.

THE FIFTH CIRCUIT'S RULING THAT THE PLAINTIFF WAS SPEAKING AS AN EMPLOYEE ON A MATTER OF PRIVATE CONCERN IS NOT INCONSISTENT WITH *CONNICK* AND *RANKIN*.

Resolution of this case did not involve any unsettled question of constitutional law, and the Petitioner argues none. The decision of the Court of Appeals only applied this Court's controlling precedent and applicable constitutional doctrine to the facts presented by the Petitioner.[1] The Court of Appeals found that the Petitioner disputed his role in the internal affairs investigation and that he focused on the issue of corruption only insofar as it impacted his wish to continue his investigation.[2]

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[1] The Fifth Circuit relied on its decision in *Terrell v. University of Texas Sys. Police*. 792 F. 2d 1360 5th Cir. 1986 , *Cert. denied*. 479 U.S. 1064 1987.

[2] The Petitioner does not seek review on the basis that the factual findings of the Court of Appeals are not supported by the summary judgement evidence. Therefore, we must take this finding as correct for the purposes of our argument.

The Court of Appeals held that Petitioner did not speak as a citizen but as an employee embroiled in a personal employee dispute.[2] The Court of Appeals, as mandated by *Connick* and *Rankin*, was deciding, as a threshold question, whether the Petitioner's speech could be fairly characterized as constituting speech on a matter of public concern.

The Petitioner cites several isolated and incomplete statements of the Court of Appeals' decision to support his argument that the court's opinion misapplied *Connick* and *Rankin*. The petitioner, perhaps guided by self interest and by his very own ideological perception of the free speech values, misconstrues the decision of the Court of Appeals. Interestingly, the Petitioner does not argue that a correct application of *Connick* and *Rankin* would have yielded a favorable result to the Petitioner.

The Court of Appeals characterized the speech at issue in the nature of police corruption.[3] The court also held that police corruption was an issue of public concern. However, the court made clear that the "importance" and "content" of the speech, contrary to Petitioner's argument, was not determinative. The Court of Appeals' refusal to limit the analysis to the "content" and "importance" of the speech is consistent with *Connick*.[2]

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[1] App. 10-11. Speech is protected when an employee as a citizen on matters of public concern and not as an employee upon matters only of personal nature. *Connick*, 461 U.S. at 147.

[2] See App. 11. The Petitioner did not allege that his "speech" was in the nature of "police corruption." The Court Of Appeals may have considered that "police corruption" encompassed the speech that Petitioner did raise i.e., allegations of criminal conduct against the Chief of Police and Petitioner's perceived irregularities in the investigation by internal affairs.

[3] Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. *Connick*, 461 U.S. at 147-148.

Review of the decision is not justified on the basis that the opinion conflicts with the holding of *Givan v. Western Line Consol. School District*, 439 U.S. 410.[1] While it is true that the speech to which the Petitioner points occurred within the confines of the police department, the lower court found that the Petitioner's expression was related to a personal employment dispute. Speech not concerning a personal grievance is a strong aspect of the *Givan* decision. Recognizing that an employee *qua* citizen need not communicate directly to the public[2], the Court in *Connick* noted that *Givan* applies to an employee who acts as a citizen rather than to an employee who is involved in a personal employment dispute.

The Petitioner suggests that statements of the Court of Appeals that the Petitioner did not complain and went "public," somehow conflict with *Givan*. The petitioner was ordered to make a written statement about his investigation and, thereby, he could have reduced his concerns to writing. He refused to do so three times, conduct that was patently insubordinate. By refusing to make a written statement by which he could bring out his concerns in the context of a formal investigation sanctioned by the City, the Petitioner declined the opportunity to begin to tie down his own concerns, as an employee, to broader concerns of a public nature. It was the Petitioner's refusal to speak up that culminated in the events where he surrendered his badge. The refusal to speak out, to complain and go "public" can only support the Court of Appeal's conclusion that the Petitioner was only engaged in expressing his own dissatisfaction about his role in the investigation. The Petitioner misconstrues the decision if he reads that the Court imposed on the Petitioner, as a requirement for protection, that he go public.

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[1]*Givan* protects speech where an employee speaks out as a citizen on a matter inherently of public concern, not tied to an employment dispute, but arranges to do privately. *Connick*, 461 U.S. at 148 n.8.

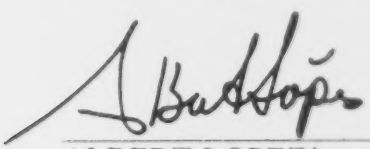
[2]*Connick*, 461 U.S.148 n.8

II.

CONCLUSION

The underlying theme of the Petitioner's Questions Presented is his disagreement with the ideological basis of the precedents of the Supreme Court concerning "speech" within the context of governmental employment. His disagreement permeates his analysis of the lower court cases, as well as the case at bar. The Petitioner does not present "special and important reasons" that would justify review by this Court and, therefore, it should be denied.

Respectfully submitted,



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